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OF THE UNITED STATES
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CONTESTED ELECTION CASE

OF

JOHN M. PARSONS

CONTESTANT

V.

EDWARD W. SAUNDERS

CONTESTEE

FROM THE FIFTH CONGRESSIONAL
DISTRICT OF VIRGINIA

ARGUMENTS OF COUNSEL

BEFORE COMMITTEE ON ELECTIONS NO. 2

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Committee on Elections No. 2.

JAMES M. MILLER, Kansas, *Chairman.*
JAMES F. BURKE, Pennsylvania.
DUNCAN E. McKINLAY, California.
JOHN M. NELSON, Wisconsin.
JOSEPH HOWELL, Utah.
WILLIAM S. BENNET, New York.
WILLIAM E. TOU VELLE, Ohio.
JAMES A. HAMILL, New Jersey.
CHARLES A. KORBLY, Indiana.
Albert P. Myers, *Clerk.*

CONTESTED ELECTION CASE OF JOHN M. PARSONS v. EDWARD W. SAUNDERS, FROM THE FIFTH CONGRESSIONAL DISTRICT OF VIRGINIA.

Committee on Elections No. 2,
House of Representatives,
Wednesday, March 2, 1910.

The committee met at 10.30 o'clock a. m., Hon. James M. Miller (chairman) presiding.

Present on behalf of the contestant, Hon. John M. Thurston, Hon. A. J. Montague, and J. H. Carrico, esq.

The contestee appeared in proper person.

The Chairman. The committee will be in order. The subcommittee is ready to report and we will receive their report the first thing.

Mr. Bennet. Mr. Chairman, for the subcommittee we have to report that we counted the ballots, some 14,000, and report that there were cast for Mr. Saunders 7,025 ballots; for Mr. Parsons 6,910 ballots; for Mr. Mathew, 15 ballots. That we report to the full committee 239 ballots as void; that there were 115 doubtful or contested; that there were 79 ballots from which the voter erased the name of Mr. Parsons, leaving on the names of both Mr. Saunders and Mr. Mathew, and that there were 133 ballots from which the name of Mr. Saunders was erased and the names of Mr. Parsons and Mr. Mathew were left; that we have not counted these ballots in either instance for Mr. Saunders or Mr. Parsons, but report them to the full committee for its action.

The Chairman. If there is no objection, the report of the subcommittee will be received and filed, and no action will be taken on it at this time in view of the fact that I think both sides want to argue some propositions in reference to these ballots for the purpose of determining the count under the law of the State of Virginia. Have you gentlemen any agreement as to time, how long you want on each side? If you folks will make some suggestions to the committee, we will be glad to follow them, if we can.

Mr. Thurston. Mr. Chairman, I was speaking with Mr. Saunders, and we have not reached any meeting of minds on that subject. There is only one suggestion I would like to make to the committee. If there is to be a time limit I would like it fixed before the argument commences, so that we can adjust ourselves to it. We are in the hands of the committee entirely, and willing to follow any rule you may wish to adopt. On our side I think we could give the committee a fair understanding of our case, opening and closing arguments, in about three hours, which I would suggest, if there is to be a time limit fixed.

The Chairman. Three hours for the entire argument on each side?

Mr. Thurston. Three hours on each side.

The CHAIRMAN. Six hours altogether.

Mr. SAUNDERS. Mr. Chairman, as Senator Thurston has said, I talked with him about the matter this morning for just a moment. I have only to say now what I said heretofore when this question as to a time limit was first asked me, and that is that the only request in connection with this case which I wish to submit to the committee is one for ample time for argument. I want no delay or anything of that sort in connection with the hearing, but this is a case which, with respect to the variety of points to be considered in relation to the Virginia laws, as well as in relation to what you may call the larger questions of law outside of the laws local to Virginia, can not be presented in any limited time in such a manner as to make the argument of any service to the committee. The committee has either to do an immense amount of work of its own volition, without regard to the aid counsel may give it, or it can limit that amount of work, curtail the same, and relieve itself, by securing the help of counsel who have been over the entire ground, whether of law or fact. I have been over this case with a view to putting my conclusions in such shape that I may be of aid to the committee. I have run down every question of law connected with this inquiry, have run down the evidence relating to every contested vote, and I think that, with respect to the work of the committee, I can be of aid to them by an oral argument not too limited as to time. I think after the committee gets into this case it will find that if an argument is to be of any value at all it would be with reference to those phases of the case of which I have spoken. I would suggest, and I suggested this to Senator Thurston, that it would be better for the committee to proceed for a while so as to get some idea of the scope of this case and of the questions that will be brought into it, and then let them determine on the limitations of the argument. You will find when you take up this case that there is, I may say, an infinite variety of details to be considered in the light of the evidence and of the laws of Virginia, as well as of the general laws. I want to be of help to the committee by presenting my case in such a way as will aid them to secure the information that they will have to secure in order to arrive at that comprehensive view of this case that will be essential before a decision can be rendered on the merits.

The CHAIRMAN. What would you suggest to the committee as a reasonable length of time?

Mr. SAUNDERS. I would suggest this, to permit us to go far enough into the case for the committee to secure that knowledge of which I speak, namely, a knowledge of the scope of this case. There is not a proposition of law that will be advanced here—save those outside of the State—with which the committee will not find themselves unfamiliar. There are questions of law arising under our own constitution that will have to be argued as separate propositions, and will, in themselves, require no little time. There are other features of our law, that will not require so much time for argument, but this law will have to be applied to a number of specific cases, and these cases must be run down and related to the appropriate law. This I wish to do in my time. I do not want a moment of time, unless in that moment I can be of help to the committee.

Mr. THURSTON. I do not see, Mr. Chairman, how it would be at all fair to us to start in without any time limit and fix one afterwards.

Mr. SAUNDERS. It seems to me it would be as fair for one side as for the other.

Mr. THURSTON. We would have to make our opening statement. I would not want to have the responsibility thrown upon me in making the closing argument of answering ad libitum everything that might be drawn out in an extensive argument.

Mr. SAUNDERS. If the Senator will pardon me, I will say this, if what I put in my argument is of no value, it will not trouble you to answer it; if it is of value, the committee should know it.

Mr. THURSTON. Whatever time we have we want to divide among ourselves, and I want to throw some of the labor on my associates who have to talk before I do, if there is to be any time limit.

Mr. SAUNDERS. If the committee will pardon me, I wish to refer for a moment to the brief which the gentlemen have filed with respect to the contested ballots. In relation to these ballots: These ballots were cast for the one or the other of the candidates and are affected in each case with a designated disability. With respect to each individual voter that they have cited, I have made an inquiry as to the same, and I am prepared to show in such a way that these gentlemen can not controvert it, because it will be done from the record, that in many cases the references of the contestant are utterly inadequate to the disposition of the case. You will have to make this inquiry either apart from our help or it can be done with our help. I do not wish to consume a moment of the committee's time save in such a way as to be helpful to the committee in determining these inquiries. I have been at a great deal of pains to segregate the various facts of this case.

Mr. BENNET. I move that, without fixing any time limit at this time, the committee instruct counsel that it is the sense of the committee that they endeavor to confine their arguments on each side to five hours on a side. That leaves them free, either side, if they find they can not complete in a less time.

Mr. THURSTON. I do not suppose the committee will require us to occupy all the time? [Laughter.]

Mr. BENNET. No.

The CHAIRMAN. We will be very glad if you do not. [Renewed laughter.]

(The motion having been seconded and the question put, the motion was carried.)

The CHAIRMAN. I want to say, as far as I am personally concerned, and I think I am speaking also for the committee, that we are anxious to get all the help we possibly can from counsel, and before you start into the argument I want to make a statement of this case as I understand it, not speaking for the committee now, but for myself. The contestant in the case claims his right to sit in this Congress by reason of the fact, as he alleges, that the State of Virginia by its legislature, after the census of 1900, redistricted the State, and following that redistricting they again changed the districts of the State in 1908, taking one county out of the Fifth Congressional District and adding it to the Sixth Congressional District. The contestant claims that, having exhausted the power or authority of the State under the census of 1900 once, they had no authority or power after that time, during that census period of ten years, to make any changes in the boundaries of the districts.

In the second place, the contestant claims that even though the State had the right to redistrict the State in 1908 as it did, having the right at any time during the census period to make any changes in congressional districts that the State may desire, it had no right to make such changes as were made by the legislature of Virginia in 1908, because of the constitutional provision of the State of Virginia which requires that in the redistricting of the State for congressional purposes the districts must be compact, contiguous, and, as nearly as possible, equal in population. It is alleged here by the contestant that the Fifth Congressional District of Virginia, prior to the redistricting of 1908, had a population of 175,579; that the Sixth Congressional District had a population of 181,571; that the legislature of the State of Virginia at that time provided that the county of Floyd should be taken out of the Fifth Congressional District, this county having a population of about 15,000, and added to the Sixth Congressional District, which would give to the Fifth Congressional District a population of 160,191, and the Sixth Congressional District a population of 196,959.

It is further alleged by the contestant that a number of ballots were thrown out by the judges of election in this congressional district at the election held November 3, 1908, by reason of the fact that more than one name appeared under the congressional designation as a candidate for Congress, and it appears from the evidence in this case that some years prior to this election one Elliott Mathew, whose name appears upon the ballots as a candidate for Congress, had been adjudged insane, and for several years had been a patient at the state hospital for the insane of the State of Virginia. That prior to the election of 1908 he made his escape from the hospital, and while at large he wrote a letter to the secretary of the Commonwealth asking to have his name placed upon the ballot in this district as a candidate for Congress. It is claimed by contestant that Mathew having been adjudged insane and being insane at this time, his name being upon the ballot is a nullity, and ought not to have any legal force or effect in the question of counting the ballots as returned in this election contest.

It is further claimed by contestant that there were a large number of voters voted for the contestee in this district at the election of 1908 who were not legally qualified under the laws of Virginia to vote, not having paid their poll tax or having whatever other legal qualifications are necessary to entitle a man to vote under the laws of the State of Virginia.

It is claimed on the part of the contestee that the State of Virginia had a right at any time during the census period to make such changes in its congressional districts as it might desire to make, notwithstanding the constitutional provision in reference to redistricting the State; that it had a right to make such a change as was made in 1908 by the legislature of Virginia.

It is further claimed by the contestee that even though Mr. Elliott Mathew had been adjudged insane and was insane at the time of asking that his name be put upon the ballot, he had a right to have his name on the ballot and to be voted for by any person who might desire to vote for him for Congress.

It is also claimed on the part of the contestee that many, if not all, of the votes that are challenged here by reason of the parties not

being on the poll-tax list should be counted, as those parties were still entitled to vote under the laws of the State of Virginia, if they had paid their taxes, as required by law.

It is conceded on the part of the contestee here that if the committee should find that the State had no right to make the apportionment that was made by the legislature of Virginia in 1908, taking Floyd County out of the Fifth Congressional District and adding it to the Sixth Congressional District, the votes received by the contestant in Floyd County would overcome the majority of the contestee as returned by the judges of election, and that the contestant, Mr. Parsons, would be entitled to a seat in this Congress.

Mr. SAUNDERS. If you will pardon me in that connection, the concession is not exactly in that form. My concession is that should the committee consider that under the law they can count the votes in the county of Floyd, there would be enough votes there to seat Mr. Parsons. Of course, apart from the question of the right of the State to redistrict, I reserve the right to contend that the committee could not count, as a matter of law, the ballots cast for Parsons in Floyd County; but I admit that, should the committee determine to count them, as a matter of law, there would be enough of them to elect Parsons, if added to the ballots cast for him in the fifth district as constituted by the act of 1908.

The CHAIRMAN. He has filed here in writing the concession he makes, and it might be put in the record at this place.

Mr. SAUNDERS. Yes; that may be done.

(The concession referred to is as follows:)

With respect to the county of Floyd, contestee submits the following:

This county, by act of the Virginia legislature, was transferred from the Fifth Virginia District to the Sixth Virginia District prior to the election in November, 1908. At that election a number of voters undertook to vote for John M. Parsons, the Republican candidate for Congress in the Fifth Virginia District as constituted by the act aforesaid, erasing from the official ballot in the Sixth Virginia District the name of the Republican candidate in that district and substituting therefor the name of the said John M. Parsons as aforesaid. It is a part of the contention of contestant that these votes so cast for the said contestant in the said county of Floyd under the circumstances aforesaid can now be counted in favor of the contestant by this committee. Contestee utterly denies that this can be done under any view of the law, but should the committee hold that the Floyd ballots can be counted, contestee is willing to admit, as a matter of fact, that enough ballots were cast for said contestant in this county to overcome contestee's official majority in the Fifth District, as constituted by the act of 1908 as aforesaid. This statement or concession on the part of contestee will make it unnecessary for the committee to go through the formality of counting the Parsons ballots in the county of Floyd.

February 23, 1910.

E. W. SAUNDERS.

The CHAIRMAN. I made this statement for the purpose of aiding counsel in a presentation to the committee of their argument of the case. You have the understanding of this case on the part of the committee, or at least on the part of the chairman of the committee, as to what both sides claim. I do not understand it is claimed in this case by either side, at this time at least, that there was any fraud in connection with the election in the Fifth Congressional District of Virginia, or in the counting of the ballots. I want both sides to know the understanding of the committee on that proposition. The committee counted the ballots, I may say, for the purpose of finding out how many ballots were cast in the Fifth Congressional District for two persons and were thrown out by the judges of election, which is

the only way we could determine that question, and that was the sole object we had in counting the ballots. If that question had not been raised I do not know whether the committee would have wanted to go into the counting of the ballots at all or not. Second, I want to say on the question of the counting of the ballots that we did not count the ballots in Floyd County, for the reason that the contestee, Judge Saunders, filed with the committee the concession here in reference to that count, and thus avoided the responsibility on the part of the committee of taking up the time of the committee in counting those ballots.

Having said this much, I would like to have the counsel in the case, as far as possible, confine themselves to certain legal propositions, if they will: First, as to the right of the State of Virginia to make the apportionment that was made in 1908 in the congressional districts in the State. Just two claims are made by the contestant on that point—that, having exhausted the power or authority to redistrict the State, it had no other authority; and, second, that even though that position is not tenable, I understand the contestant takes the position that under the constitution of the State they had no right to make the kind of change that was made, because of the unequal population in these two congressional districts.

On the questions that are raised in reference to the name of Mr. Mathew appearing on the ballot, I would like to have counsel point out to the committee, if they can, any authorities that sustain the contention of the contestant that, even though it is admitted that Mr. Mathew was an adjudged lunatic under the laws of the State of Virginia, and confined in the hospital for the insane in that State at the time of the election, his name on the ballot was a nullity, and that it had no legal force or effect, and that votes cast for Mr. Parsons and Mr. Mathew ought to be counted, or votes cast for Mr. Saunders and Mr. Mathew ought not to be counted. If there are any authorities sustaining the other side of this proposition, we would like to have Judge Saunders point them out.

On the question of these votes that it is alleged were illegal votes because the voters did not have the qualifications required under the laws of the State of Virginia, I want you to point to us fully all sections of the law of the State of Virginia under which you claim that these were not legally qualified voters on behalf of the contestant.

Mr. SAUNDERS. Mr. Chairman, just in that connection, with respect to Mathew, I would like for you to add that prior to the time he sent in his notice of candidacy to the secretary of the Commonwealth, he had spread broadcast through the district the fact that he was a candidate, announcing the same by means of postals, letters, and posted notices—in other words, he was an announced candidate, so far as that was concerned, some time prior to the time when he sent his notice of candidacy to the secretary of the Commonwealth.

The CHAIRMAN. Is there anything in the record here to show that?

Mr. SAUNDERS. Yes, I can turn you to that in a moment.

The CHAIRMAN. Aside from two cards.

Mr. SAUNDERS. Two cards, and the evidence of A. S. Gravely that notice of his candidacy was posted on the court-house door in Martinsville. In addition, you will find by looking to one of the exhibits the letter from Martin to the secretary of the Commomwealth

that the former called the attention of the secretary of the Commonwealth to the fact that this man was a lunatic, and added further in his letter that Mathew had been advertising himself as a candidate for some time prior to the date at which he sent in his notice. (See Record, pp. 326, 266, 415.)

Mr. BENNET. Mr. Chairman, is there not one other legal question? I understand there is a contention on the part of the contestee that, despite the fact of the statute which may or may not be construed in opposition thereto, if a man had actually paid his poll tax for three years preceding the election, whether he appeared on the poll-tax book or not, he had the right to vote. I understand that a legal question is raised.

Mr. SAUNDERS. That is not exactly a correct statement of the proposition.

Mr. BENNET. I did not make it as a correct statement

Mr. SAUNDERS. I mean that the gentleman is under some misapprehension.

Mr. NELSON. I understand counsel are going to inform us of the requirements?

The CHAIRMAN. Yes.

Mr. NELSON. Generally, and that would be included.

Mr. BENNET. Yes; I just wanted to call attention to that as an additional question.

Mr. SAUNDERS. I just want to state my proposition in this connection. It is not that the statute is unconstitutional, or anything of that sort, but that the constitution of Virginia does not require a voter's name to be on this posted tax list as a prerequisite to the right to vote. There is no such constitutional or statutory requirement.

Mr. BENNET. That is what I intended. I did not try to state the exact language.

The CHAIRMAN. I have stated the chairman's understanding of this case for the sole purpose of helping counsel to present such arguments to us as may cover the real contentions of this case. Counsel will be allowed to make any corrections that they wish as they argue the case to the committee.

Mr. SAUNDERS. I think the chairman's statement of it, so far as I am concerned, is accurate. Before we take up the argument I would like to make two corrections in the record, so far as it affects me. One is in my brief, on page 48, where I would ask that this correction be made: You will find about three-quarters of the way down the page this language: "Contestant alleges that Mathews was not eligible to Congress. This is conceded." The word "not" must be in there. "This is not conceded."

On page 91 of the analysis I filed with the committee, in reference to a man named Mills, you will find that the fourth line of the analysis reads as follows: "It is not shown how Mills voted." The word "not" should be erased. It should read, "It is shown."

Mr. BENNET. That is erased here.

Mr. SAUNDERS. I did not know in how many of the analyses the correction had been made, and I wanted to have this change put in all of them.

The CHAIRMAN. The contestant will now be heard in this matter, himself or by counsel.

Mr. THURSTON. I wish to suggest to the committee, and I suppose there will be no objection to it, that we desire to have arguments made in the opening of the case by Mr. Carrico and by Governor Montague. We wish to be fair to the other side and have the whole case presented before Mr. Saunders replies, and then I will close.

ARGUMENT OF J. H. CARRICO, ESQ., OF INDEPENDENCE, VA., ATTORNEY FOR THE CONTESTANT.

Mr. CARRICO. Mr. Chairman, I suppose it is immaterial to the committee as to which of the propositions laid down is argued first?

The CHAIRMAN. Certainly; take your own course.

Mr. CARRICO. Mr. Chairman and gentlemen, I shall not try to argue all the propositions that were laid down by the chairman. There are three propositions that I think should be considered by the committee in determining whether the contestant or contestee is entitled to a seat under this record. The proposition which I intend to discuss first is the proposition as to whether the name of Eliot Mathew, a lunatic, which appears on the ballot, is a nullity, and whether his name being on the ballot along with another name, either that of the contestant or contestee, would disqualify that ballot, and the ballot should be counted for neither one.

The next proposition that I shall discuss is to the question of the poll tax of the voters. In the State of Virginia all persons are required to pay poll taxes that are assessable against them for three years next preceding the election in which they offer to vote, except soldiers who have served in the civil war between the States on either side. Our tax is levied as of the 1st day of February of each year, and a young man coming of age since the 1st day of February of that year would simply apply to the treasurer and get a certificate and vote on that, and his name would not have to appear on the poll-tax paid list.

Mr. BENNETT. Pardon me right there. What are the provisions as to people who move in from other States?

Mr. CARRICO. A man moving in from another State must have been in the State for a period of two years. He then, as shown by the registration books, would only be assessable for poll tax for two years, and he would only appear on the poll-tax books as paid for two years. The registration books are required to be present at the polling place at each election. His registration shows where he came from, the time of his registration, and the time for which he should have paid poll tax.

Mr. SAUNDERS. In that connection would it bother you for me to interrupt you?

Mr. CARRICO. Not at all.

Mr. SAUNDERS. It is not necessary in all cases for them to have paid two years' taxes. They may be only liable for one year's taxes, and still possess the right to vote, if the tax of that year is paid at the proper time.

Mr. CARRICO. That is right; they may be only liable for one year's taxes, but the registration books will show the length of time a man is liable for the taxes. For that length of time the contestant claims he should appear on the poll-tax list, which I will discuss more at length when I come to it.

The next question, which I shall deal with very briefly, is the question of the constitutionality of taking Floyd County out of the fifth and adding it to the sixth district.

As to the proposition that Elliot Mathew was a lunatic and that his name was a nullity on the ballot and that on all ballots on which his name appears and the name of the contestee is marked out, the contention of the contestant is that those ballots should be counted for the contestant, and vice versa. Elliot Mathew, it is conceded, I think, in the contestee's brief, if I mistake not, is a lunatic. It certainly affirmatively appears in the record that he was a lunatic at the time he was circulating these notices of contest; he was a lunatic and an escaped lunatic. He had been adjudged a lunatic and sent to the Marion hospital for the insane some ten years previous to this. At various times he had been discharged as improved.

The CHAIRMAN. Who was the superintendent of the asylum?

Mr. CARRICO. Mr. King.

The CHAIRMAN. Mr. King testifies and presents there the record of the hospital.

Mr. CARRICO. I know he does.

The CHAIRMAN. He shows that at that time he had escaped from the hospital.

Mr. CARRICO. Yes; I think it was in May he was taken back to the asylum and in June or July he escaped from the hospital and was returned to the hospital some time in October. Certain it was that at the time of the election he was in the insane asylum.

Now, gentlemen, an insane man in Virginia is not entitled to vote, and certainly is not entitled to hold office. I do not think it will be seriously contended before this committee that a lunatic has any right to a seat in Congress, especially while he is an adjudged lunatic. The Virginia law is, "An insane person shall be construed to include every lunatic, noncompos, or deranged person." That is Pollard's Code, first volume, page 5. There is no question of this man being a lunatic. The Virginia law provides further that idiots, lunatics, and persons noncompos are excluded from registering and voting in the State of Virginia. It is not contended here that this man was a registered voter or that he was a voter, and certainly he can not hold office. In Virginia the way a person gets on the ballot is this: He must notify the secretary of the Commonwealth thirty days prior to the election, in writing, that he wishes to become a candidate. That notice must be witnessed by two witnesses.

Mr. BENNET. Twenty days, is it not, for a Congressman?

Mr. CARRICO. I may be mistaken as to that; it is either twenty or thirty. There is no question but what Elliot Mathew sent in a paper writing signed by himself and witnessed by two witnesses in time for his name to be placed on the official ballot. The only question there, is as to whether that writing had any force or effect; whether that writing was a legal notice. If it was not a legal notice, then, in its inception, no act of the secretary of the Commonwealth or of the electoral boards of the different counties in placing that name on there could make it a valid act, being invalid in its inception. As to his being a lunatic, the official records of the hospital are here:

The official records of a hospital are competent evidence of the mental condition of a patient who has been confined in such institution. (Am. and Eng. Ency., vol. 16, p. 626; 99 Mass., 40; 46 Nebr., 493.)

It has been held by a number of States that after an inquisition and adjudication of insanity of a person, all of his contracts, all of his writings, are absolutely void, except for necessaries. The courts say:

After inquisition and adjudication of insanity, all his contracts, except for necessaries made while such adjudication is in force, are void. (Trust & C. Co. *v.* Boone, 102 Ga., 202; Burnham *v.* Kidwell, 113 Ill., 425; Pearl v. McDowell, 311 Marsh (Ky.), 658; Carter *v.* Beckwith, 128 N. Y., 312; Haley *v.* National Loan, etc., Co., 44 W.Va., 450.)

Any contract with an insane person is not only voidable, but absolutely void. (22 Cyc., 1196; Dougherty *v.* Payne, 127 Ala., 577; Burke *v.* Allen, 29 N. H., 106; Edwards *v.* Davenport, 20 Fed., 756; Westerfield *v.* Jackson, 3 N. Y. St., 353; 61 Am. Dec., 642; Dexter *v.* Hall, 15 Wall. (U. S.) 9, 21 L. ed., 73.)

The court in the case of Dexter *v.* Hall says:

If at the time Hall executed the power in question he was insane and his insanity was general, the instrument was a nullity.

Further the court says:

The instrument in such a case is no more to be regarded as the act of Hall than if he was dead at the time of its execution.

Now, gentlemen, if this paper writing which Elliot Mathew sent to the secretary of the Commonwealth was no more to be regarded than if the writing had come from a dead man, I do not think it will be seriously contended before this committee but what that paper writing, when it started out, was invalid, and if invalid in its inception, it could not become valid by any acts of the secretary of the Commonwealth or any electoral board in acting upon it.

The good faith of one party and that party acting in good faith can not render an invalid act valid. (Hanley *v.* Nat'l Loan & In. Co., 44 W. Va., 452.)

I think, gentlemen, that it is also settled in the Supreme Court, in German Savings and Loan Society *v.* Delashmut (67 Fed. Rep., 400), where it is said:

The deed of a person non compos mentis is void. A person incapable of understanding is incapable of executing a deed or contract. It is now settled that deeds and contracts of insane persons are absolutely void.

If all contracts and all paper writings are void as to lunatics and people non compos, then certainly his notice of his candidacy to the secretary of the Commonwealth was absolutely void and invalid. Further, gentlemen, the secretary of the Commonwealth did not act with his eyes closed. The record shows here that previous to the time for printing the ballots he had sent the names of the candidates to be placed on the official ballots. The secretary of the Commonwealth, after receiving these notices, and previous to the time for printing the ballots, certifies all names to the different electoral boards of the county, which are composed of three persons appointed by the circuit court of the county. They, of course, are all Democrats.

After the secretary of the Commonwealth had certified these names out to the electoral boards of the different counties the secretary of the electoral board of Franklin County notified him that Elliot Mathew was a lunatic. The secretary of the Commonwealth took no steps to prevent his name going on the ballot, but informed the secretary of the electoral board that there was no way by which he could prevent his name going on there, and his name did go on there. It is contended here in the contestee's brief that the contestant should have taken precaution and taken the matter to court and enjoined his name from going on the official ballot.

Mr. BENNET. Pardon me just a second. Did not the secretary of the Commonwealth seek to obtain an opinion in writing from the attorney-general?

Mr. CARRICO. He sought an opinion from the attorney-general, but I think not in writing, sir; and the attorney-general was of the opinion that he was, that he could not prevent his name going on the ballot.

Mr. NELSON. You claim that the secretary of the Commonwealth had the right of his own accord to pass upon that, as to whether a man is insane or not?

Mr. CARRICO. No, sir; he did not have the right to pass on whether he was insane or not, but when he is already adjudged a lunatic he had a right to pass on whether he had received a legal notice of his candidacy or not.

Mr. NELSON. And when he is furnished the proof?

Mr. CARRICO. And when he is furnished with the proof, as he was. He was informed by the secretary there of the electoral board of Franklin County that this man was a lunatic, and was at the time in an insane asylum. My contention is that he had the right to pass on the fact that he had received no legal notice from a person who was capable of giving a legal notice, and therefore that his name ought not to be certified out to go on the official ballot. The contestee claims that it was the duty of the contestant to have gone into the courts to enjoin the secretary of the commonwealth or the electoral boards of the different counties from placing Elliot Matthew's name on the ballots. Gentlemen, it was an impossibility. The contestant did not know whose name was going to appear on that ballot. The electoral boards throughout the counties received the names; they were taken in, and the printer is sworn not to divulge the names that go on the ballots, and no one but the Democratic electoral boards throughout the county and the secretary of the commonwealth knows who is going on that ballot or who is on the ballot until you go in on the day of the election to vote. Certainly the contestant had no chance whatever to enjoin the name from going on the ballot.

Mr. BENNET. The electoral boards of the different counties were all of one party? We found that there were several counties that were Republican.

Mr. SAUNDERS. You mean the judges of election at several points in those counties.

Mr. BENNET. I mean the counties were Republican. In those counties were not the electoral boards Republican?

Mr. CARRICO. No, sir; the Republicans had not a representative on an electoral board in any county. They are appointed by the judges, and the judges are elected by the legislature, and of course the legislature is very largely Democratic in our State, and all the judges are Democratic, and they appoint Democratic electoral boards.

Mr. NELSON. Explain what an electoral board is.

Mr. CARRICO. The electoral board has the duty of having the official ballots printed and appointing the judges of election and appointing the registrars for the county.

Mr. NELSON. Are they appointed by the governor?

Mr. CARRICO. They are appointed by the circuit courts.

Mr. SLEMP. By the judges.

Mr. CARRICO. The judges of the circuit courts appoint the electoral boards; they appoint the judges of election and registrars, and they have charge of printing and distributing the official ballots which are voted.

Mr. BENNET. Let me see if I have this straight. The legislature elects the circuit judges, the circuit judges appoint the electoral boards, and the electoral boards appoint the judges of election?

Mr. CARRICO. Yes, sir.

Mr. BENNET. And there is some provision in your statute as to bipartisan or minority representation amongst the judges of election, but none as to membership on the electoral boards; is that right?

Mr. SAUNDERS. That is correct.

Mr. CARRICO. We have a statute which says that representation shall be given to the party casting the next highest vote at the preceding election for judges of election, but there is no provision in our statute providing that the Republicans shall have representation on the electoral boards, who have the appointing of the judges of election, and of course they appoint whoever they see fit.

Mr. HOWELL. Do I understand you to say that the people are not informed until the day of the election who are the candidates?

Mr. CARRICO. No, sir; they are not informed as to who appears on the ballot or as to the ballot. You do not know what kind of a ballot you have until you go in to vote. I think that will be conceded.

Mr. NELSON. You do not know who the candidates are?

Mr. CARRICO. We do not know in what shape their names will appear on the ballot, whether at the bottom or at the top. They must come in consecutive order for the same office.

Mr. NELSON. There is no requirement for publication?

Mr. CARRICO. None in the world; in fact our law prohibits it.

Mr. HAMILL. When you go into the polling place, how many men have control of the ballot box; how many judges or officers are there there?

Mr. CARRICO. There are three judges and two clerks.

Mr. HAMILL. And what is the complexion politically of the three judges and two clerks?

Mr. CARRICO. In some places they are all three Democrats, the judges; most every place both the clerks are Democrats. In one or two places the Republicans had all three Republican judges, because there were no Democrats to fill the place.

Mr. SAUNDERS. I deny the latter proposition in part.

Mr. HAMILL. There is a requirement, though, that the electoral board appoint a bipartisan board of judges; is that correct or not?

Mr. CARRICO. That is the law.

Mr. HAMILL. They are supposed to be bipartisan?

Mr. BENNET. Not bipartisan, but a minority representation.

Mr. CARRICO. A minority representation.

Mr. BENNET. One to two?

Mr. CARRICO. One to two.

Mr. BENNET. There is no provision about clerks?

Mr. CARRICO. There is no provision about clerks, but they are appointed as Democrats. Another provision is that all persons registering prior to 1904 may have the assistance of either one of the judges in the preparation of his ballot.

Mr. SAUNDERS. In that connection, Mr. Hamill, I wish to say that the clerks have nothing in the world to do with the ballots or the ballot boxes. They merely keep the tally of the voters on the poll books.

Mr. CARRICO. They keep the poll books, keep the names of the voters. I do not know how it is in Judge Saunders's county, but in our county they have a good deal to do as to who shall vote and who shall not.

Mr. SAUNDERS. That is not so in my county, nor is there anything of that sort in the record.

Mr. KORBLY. If some one had made the statement that Mr. Saunders or Mr. Parsons was insane, would it have devolved upon the secretary of state to decide upon the question of his sanity?

Mr. CARRICO. No, sir; I think not. I say this: Had either been an adjudged lunatic and the secretary of the Commonwealth had been informed of it, then he should have left the name off, because he was not a competent voter; he would not be competent to hold office. This point was put up to the secretary of the Commonwealth, and you will find it in the record: It was asked if a woman would send in her name if he would place her name on the official ballot, and he said he would not.

Mr. NELSON. Is there any provision of law, any precedent, where a secretary of state is permitted to exercise discretion as to whom he will put on the ballot?

Mr. CARRICO. No, sir; but he must receive legal notice of the candidacy.

Mr. NELSON. Having received that, is there anything in law that gives him the power to say that he will or will not?

Mr. CARRICO. No, sir; I think not. If he had received a legal notice, I think he should have placed the name on the ballot; but my contention is that, being a lunatic, Mathew could not send any legal notice; that the notice was invalid in its inception, and he did have the right to leave off a man who has no right on the ballot. For instance, if a man from North Carolina should send in his name, he certainly could not become a candidate in Virginia; the secretary would certainly have the right to leave his name off the official ballot. He would have received no legal notice from a man who could become a legal voter.

Mr. HOWELL. Is it shown that the secretary had sufficient evidence to prove the lunacy of Mathew?

Mr. CARRICO. Yes, sir; the records of the State show it there. He was informed by the secretary of the electoral board of Franklin County that this man was a lunatic; that he was in the hospital for the insane at Marion, Va. The records in Richmond there, which the secretary of the Commonwealth keeps, show that this man was a patient in the hospital for the insane at Marion.

Mr. BENNET. What is the name of the man who wrote him the letter?

Mr. SAUNDERS. W. D. Martin.

Mr. CARRICO. That is right, W. D. Martin.

Mr. TOU VELLE. Suppose the Constitution of the United States had placed certain restrictions upon qualifications, or had defined the qualifications necessary to be a candidate to hold the office of Con-

gressman; it having once laid down what those qualifications should be, can they be extended or limited by state authority?

Mr. CARRICO. I think not, sir. The Congress of the United States is the sole judge of its Members; the sole judge of their qualifications.

Mr. TOU VELLE. But say the Constitution of the United States had limited or passed on the matter; then what would you say?

Mr. CARRICO. Certainly the Congress of the United States is controlled by the Constitution, and Congress could not pass a law that was repugnant to the Constitution of the United States.

Mr. TOU VELLE. I do not think you caught my question. If the Constitution of the United States had put a limit or had designated who might or who might not hold this office, could the State then pass a law that would put a further limitation?

Mr. CARRICO. I think not, sir; no, sir.

Mr. KORBLY. You do not contend, Mr. Carrico, that the secretary of state was acting in other than a ministerial capacity?

Mr. CARRICO. In a certain way he was acting in a ministerial capacity, yes; but the law defines how these people may get on the ballot, my contention is, and they must give a legal notice.

Mr. KORBLY. Is the secretary of state charged with the duty of ascertaining by judicial process whether or not this is a legal notice, whether or not this man is insane, whether or not the Elliot Mathew, who has filed the petition is the same Elliot Mathew who is and has been incarcerated because of his insanity?

Mr. CARRICO. No, sir; but then when he is informed of that through the proper officials he should take cognizance of it.

Mr. BENNET. Is it not a fact, as I recall the Constitution of the United States, that the Constitution has done exactly that thing, and that under the description of who can come to Congress—a woman could from Utah, Wyoming, Idaho, or Colorado, because she is qualified to vote for a member of the legislature in those states; whereas a woman could not come to Congress from New York, and I presume from Virginia, because in those States she is not qualified?

Mr. CARRICO. Yes; that is so.

Mr. BENNET. In other words, the Constitution of the United States permits each State to prescribe in that indirect way the qualifications of the persons who shall represent that State in the Congress of the United States.

Mr. CARRICO. That is true.

Mr. BENNET. And therefore, if your state constitution prohibits a lunatic from voting, it possibly prevents a lunatic from running for Congress; that is your point?

Mr. CARRICO. Yes; that is, that he could not get on the official ballot because all of his acts are invalid, and that therefore he could not give a legal notice in order to get on the ballot, and can not be voted for.

The CHAIRMAN. What are the qualifications a man has to possess under the laws of your State to run for office or to be elected to office?

Mr. CARRICO. In our State he must be 21 years of age——

The CHAIRMAN. Must he be a qualified elector?

Mr. CARRICO. Yes, sir; our constitution says only voters can become a candidate for office. But the point I make is that his name should not be on this official ballot, because he did not get on there according to law. The law requires a legal notice to get on there. This

man being incapable of performing a legal act, he could not give a legal notice to the secretary of the Commonwealth in order to get on the ballot, and therefore, being on there illegally, his name is a nullity, and when either Judge Saunders or Mr. Parsons was marked off, then there was only one name remaining in law on there; the other name was a nullity and counted for nothing, and therefore it was not a void ballot, but should be counted for either one or the other just as it was marked. I think the law is very clear on that proposition.

The CHAIRMAN. What would you say about the ballots that have Mr. Mathew's name on alone, the only name voted for?

Mr. CARRICO. I think they are void; I do not think any one was voted for. His name had no right on the ballot because his name was not placed on there in a legal manner, and therefore when he was voted for alone that ballot was void.

The CHAIRMAN. The ballots are printed in this way, Saunders, Parsons, Mathew?

Mr. CARRICO. Yes.

The CHAIRMAN. Now, we find the name "Parsons" scratched off. How can we determine whether the voter wanted to vote for Saunders or Mathew?

Mr. CARRICO. Simply from the fact as, I take it, no one wanted to vote for a lunatic, and those who did vote for him voted inadvertently.

The CHAIRMAN. Suppose they did not know he was a lunatic, as a great many voters of the State did not know?

Mr. CARRICO. If they did not know he was a lunatic, they did not know him at all, knew nothing about him, and certainly did not want to vote for him. My judgment is that when both Saunders and Parsons were marked out the man intended to vote for no one, and it certainly leaves the ballot void, because Elliott Mathew has no right on the ticket.

Mr. NELSON. Right there, Mathew did receive 15 votes, I believe.

Mr. CARRICO. Yes.

Mr. NELSON. How are we to know? Have you any rule to guide us as to whether, when a man struck one of these out, he did not intend in these other cases, possibly, to vote for Mathew, as well as in the 15 where he was voted for?

Mr. CARRICO. There is no rule. I have never heard of a case just like this being presented in any court or before a committee of Congress. But in the record here we show you that many of these voters have testified that they did mark their ballots; some of them have testified that they marked out Parsons and left Elliott Mathew and Judge Saunders on, and they intended to vote for Judge Saunders, but that they did not know a lunatic was on there, failed to notice that point, and failed to mark his name out, and vice versa. At Comers Rock, in Grayson County, the report of the subcommittee shows there were 15 ballots returned in which Judge Saunders's name was marked out and Mr. Parsons's and Elliott Mathew's left on. We put the judge of election on from that precinct, and we put several of the voters on. The judge of election said he did not know there were but two names on the ballot, and did not discover it until away up in the morning, and that he had been marking ballots for men who wanted to vote for Mr. Parsons by simply marking out Judge Saunders's name. Several of them testified they went in to vote for Mr.

Parsons, and they did not know there were but two names on the ballot, never had heard of but two names, and they simply marked out Judge Saunders and deposited the ballot. You have that record before you.

Mr. HOWELL. Is there any designation on the ballot to indicate the political party to which a candidate belongs?

Mr. CARRICO. No, sir; there is no emblem on the ballots whatever to show whose they are, in any way.

Mr. BENNET. And before the voter goes into the booth he has no absolute knowledge of the order in which the names will appear on the ballot?

Mr. CARRICO. He has not; nor the number that will appear on the ballot.

Mr. HAMILL. Are the ballots permitted to be distributed around before the voting occurs?

Mr. CARRICO. No, sir. The ballots are sealed at the office of the printer. The printer is sworn not to divulge the names or the order in which they appear on the ballot. The ballots are distributed by the electoral board in sealed packages, not to be opened until opened in the presence of the three judges on the morning of election, and no one is permitted to be in the room while the ballots are being opened and counted, and no one is permitted to see the ballots until he goes in to vote.

Mr. BENNET. After the man goes in to vote, if I am correct, if he comes out and tells anyone how the names are printed, that is a violation of your statute, is it not?

Mr. CARRICO. No, sir; that is not a violation of the statute; it is a misdemeanor to bring the ballot out of the polling place, so that no one can exhibit a ballot. No one sees a ballot until he goes in to vote, and only the ballot that he votes; he may see the pile lying there, but he is permitted to examine only the ballot he votes.

Mr. HAMILL. But if you remember the order in which the names appear you could tell them without violation of the law?

Mr. CARRICO. Yes.

Mr. HOWELL. As a practical question, when the vote is cast in any precinct or district, is it generally a straight party vote, to a large extent?

Mr. CARRICO. Yes, sir; to a large extent, it is generally a straight party vote.

Mr. BENNET. That is not the universal rule; that was not our observation.

Mr. CARRICO. You will find there are several ballots in which the voter voted for Mr. Bryan and Mr. Parsons, and for Mr. Taft and Judge Saunders, but I do not think you will find what I call a great many of them.

Mr. HOWELL. What I had in mind was, where these 15 votes were cast for Mr. Parsons and Mr. Mathew, did Mr. Parsons——

Mr. BENNET. Fifteen were cast for Mathew alone.

Mr. HOWELL. In what district, Mr. Carrico?

Mr. CARRICO. At Comers Rock, in Grayson County.

Mr. HOWELL. At Comers Rock, there were some 15 ballots with two names on them for Congress. What do the returns show in that district as to the number of votes Mr. Parsons received as compared with his party associates on the ticket?

Mr. CARRICO. President Taft ran ahead of Mr. Parsons there some votes—I do not know how many, but some votes—so that it shows that those voters were voting for Mr. Taft, and were marking Judge Saunders out, and I think that clearly shows that the intention of the voter was to vote for Mr. Parsons, and, according to my contention, Elliot Mathew's name being invalid on the ticket, they did vote for Mr. Parsons.

As to people being acquainted with the ballot, and as to you seeing the names and coming out and telling your friends about it, it is a misdemeanor there to bring any copy of the ballot out and exhibit it to your friends, or show the order in which the names appear.

Mr. HAMILL. But if you retain the order in memory and disclose it orally after you get out, that is no violation of the law?

Mr. CARRICO. That is no violation of the law, as I understand it.

Mr. TOU VELLE. Would not that law or provision in question tend to induce men to be more careful how they marked their ballots?

Mr. CARRICO. It probably might do that, sir, but a great many men up there who have registered since 1904 have to mark their own ballots. Of course, they have to be able to read and write before they can register, but they are not very good scholars, and a great many of them do not understand the ballots after they go in there. Besides that, a great many who have registered before try to depend on their memories. They have the right to call the judge, but they do not do it simply because of the fact that they do not want some of the judges to know how they do vote, and they go in and try to mark their own ballots, and it is shown there at Comers Rock that the judge whom the Democratic electoral board gave us was not capable of marking the ballots himself.

As to the illegal votes cast throughout the district, as I said in my opening statement, every man must have paid all the poll tax assessed or assessable against him for the three years next preceding the election in which he offers to vote at least six months previous to that. There is this exemption—that is, old soldiers who have served in the civil war between the States, either on the Union or Confederate sides. They do not have to pay a poll tax as a prerequisite to voting. All others do have to pay a poll tax. As to whether they should be on there three years or not, the registration book shows when they registered and their age. It makes no difference if a man registers when he is a citizen of Grayson County; if he registers at the age of 28, he can not pay one poll tax and be entitled to vote. A young man just coming 21 years of age can pay his poll tax and take a receipt which will pay off his poll tax the next year and exhibit that without being on the poll-tax list.

Mr. BENNET. What is that year, the calendar year commencing in January, or some fiscal year down there?

Mr. CARRICO. Our poll taxes are assessed as of the 1st day of February each year.

Mr. BENNET. So that a man to vote this fall must have paid the poll tax that came due February 1, 1908, 1909, and 1910; is that right?

Mr. CARRICO. If he votes in 1911; yes.

Mr. BENNET. If he votes this coming fall?

Mr. CARRICO. Yes; if he votes this fall.

Mr. SAUNDERS. No, Mr. Bennet, that is a slight misapprehension. If he votes this fall, it would be the tax of 1907, 1908, and 1909.

Mr. CARRICO. Yes; if he votes this fall.

Mr. BENNET. He does not have to pay the poll tax that came due on February 1, 1910?

Mr. CARRICO. No.

Mr. SLEMP. That has to be paid this year, but it is counted a year back.

Mr. BENNET. As I understand, it has to be paid six months before the election?

Mr. SLEMP. It has to be paid within six months; this year, 1910.

Mr. CARRICO. To have voted in this congressional election the voter who was assessed or assessable with taxes should have paid for the years 1905, 1906, and 1907 to have voted in the fall of 1908, and he must have paid them six months previous to that time.

Mr. SAUNDERS. Provided, of course, in that connection, he is liable for three years' taxes.

Mr. CARRICO. I say, if it is assessable against him; if it is assessed or assessable against him. Say you had been living there six years and were assessable with taxes, and the assessor missed assessing you, then the law provides that you can go to the clerk of the county court and get a certificate showing that you registered in a certain precinct, and take that to the treasurer and pay your poll tax, and thereby get on the list.

Mr. BENNET. It must have been paid prior to the 3d of May, 1908?

Mr. CARRICO. Yes, sir; the 3d of May, 1908, was the last day the taxes could have been paid to have voted in this congressional election. Right in that connection my contention is that a man, in order to vote, must have been an old soldier, or must have been a young man coming of age since the 1st day of February, 1907, or he must have been on the tax-paid list in order for him to have been a qualified voter. I understand that Judge Saunders's contention is that where a man probably had paid his taxes six months prior, and brings up his tickets or certificates that he did pay that poll tax, he is entitled to vote. The constitution provides who may vote, and on the tax-paid question it says that all persons assessed or assessable with taxes must have paid them at least six months previous to the election for three years prior thereto. That fixes the qualification of a man to vote. The constitution, as well as the laws, section 82 of the Code, provides that this tax-paid list shall contain a list of all the persons who have paid this tax. It provides further that if by inadvertence a man's name is left off, this list is posted for thirty days at each precinct in the county, and that he may apply to the circuit court by giving the treasurer five days' notice, which petition of the voter shall be heard either in term time or in vacation, immediately to determine whether his name shall go on the tax-paid list. If he shows he has paid his taxes properly, his name is ordered by the court to go on this list. That is the mode of proving it. The constitution and the statutes passed under it say this, that the tax-paid list is conclusive evidence of the facts stated therein for the purpose of voting. Those tax-paid lists are lists containing the names of all persons who have paid their poll taxes prior to May 3, 1908, in order to entitle them to vote, and so forth. They are placed on that list for the number of years for which they have paid. The registration list shows whether they should be on there for more years than that.

Mr. KORBLY. In the event a voter is challenged, this list that his name is on is conclusive evidence of his right to vote?

Mr. CARRICO. Yes, sir; if he is not on there, I take it it is conclusive evidence he has no right to vote, from the simple fact that prior to 1908—the law is not so now, but for purposes of this contest, prior to 1908 a poll tax receipt was not required to be dated—that is the date of payment. Of course, it showed the year for which the poll tax was assessable, but the poll-tax receipt was not required to be dated, and if the legislature had not intended that this poll-tax list was conclusive it certainly left a gap for a good deal of fraud there. I could have paid my poll taxes the day before election and have gone in and sworn I paid them. In many instances I could have just said, "Here is my poll tax; here are the receipts."

Mr. KORBLY. In the event some elector's name is left off the list that ought to be there, he is precluded from voting?

Mr. CARRICO. No, sir; that poll-tax list, I tell you, is required to be posted at every precinct in the county, or in the city, in the wards of the city, for thirty days. He has the right to examine that list, and if his name does not appear on there, and he has paid his poll tax, he gives the treasurer five days' notice and petitions the circuit court, which petition the circuit court must hear either in term time or vacation immediately, and if he shows he has properly paid his poll tax, the court orders him to be placed on the poll-tax list. If he neglects that, he is not entitled to vote.

Mr. KORBLY. You claim that excludes him?

Mr. CARRICO. We claim that excludes him.

Mr. KORBLY. Even though he has cleared away his taxes and ought to be on the list?

Mr. CARRICO. Yes, sir.

Mr. BENNET. As I understand you, at that time the poll-tax receipts each voter received did not bear the date when the poll tax was paid, but simply the year for which it was assessable?

Mr. CARRICO. Yes, sir; that is all. The law did not require them to date the poll-tax receipt. A man paying his tax the day before election could get his receipt and come in and say, "Here is my receipts," and he would be allowed to vote.

Mr. BENNET. In other words, a man paying on the 2d of February got exactly the same form of receipt as the man paying on the 2d of May?

Mr. CARRICO. Yes. I want to state a little further. The treasurer returns these taxes delinquent along about August, some time in August, but up to that time he has the tax receipts, and a man can pay them on up from the 3d of May to the time he returns them delinquent, and he gets the same kind of receipt I would get if I paid them immediately after the receipts are made out. I should say that was the condition at that time. The legislature in 1908 required that all poll-tax receipts should be dated the date of payment hereafter. But for the purposes of this contest, and prior to 1908, the poll-tax receipts were not required to be dated, and were not dated the date of payment of them. They just showed the year for which they were assessable. The constitution then goes on further and says that the legislature may, from time to time, require such further proof of the payment of the poll taxes as they shall see fit. The legislature have not seen fit to require any further proof than the poll-tax list. Then

it goes on to state how a man from a different county coming into another county in the State may vote. If he has come into the county in such a time that he should have paid his taxes in the county in which he offers to vote, then his name must appear on the poll-tax list in that county for that year. In addition to that he must have the receipt from the treasurer of the county from which he moved, showing that his poll taxes had been paid there six months prior to the election.

Mr. NELSON. Does he have to bring the poll-tax list with him from that county?

Mr. CARRICO. No, sir; I say he must have a receipt from the treasurer of the county from which he had moved showing that he had paid his taxes for six months prior to the election. Mind you, it is not like a tax ticket; we get what we call a tax ticket. But he must show affirmatively that this man has paid his taxes in that county six months previous to the election in which he offers to vote in the county he has moved to; that is, a certificate from the treasurer that he has paid in that county six months prior to the election. But where a man is, say, in Grayson County for five years, and he has paid for three years there, he must be on the tax-paid list there for three years, and if he is not, according to Judge Saunders's contention, and he brings in his tax receipts, no matter when they are paid, if they were paid only three months before the election, if he brings his tax receipts or comes in and offers to swear that he paid them six months previous to that time he is a legal voter.

Mr. SAUNDERS. That is not correctly stated.

Mr. CARRICO. That is what I understood to be your statement.

Mr. SAUNDERS. I do not mean you are misrepresenting me intentionally; that is not what I mean at all. I affirm that if a voter is not on the tax list for three years but before offering to vote establishes the fact that he has paid his taxes as provided by law he will then be entitled to be admitted to cast his ballot. The payment of the taxes required within the time prescribed and not the appearance of his name on the list is the prerequisite.

Mr. CARRICO. Suppose that he comes in and offers to state that he has paid them in time; your contention is that he is entitled to vote?

Mr. SAUNDERS. If, as a matter of fact, he satisfies the judges he has paid his taxes in time he is entitled to vote.

Mr. NELSON. May I get that thing plain? You contend a man's name has to be on the poll-tax list, Mr. Carrico, and Judge Saunders says if he brings in his receipt at any time before election he is entitled to vote; is that it?

Mr. CARRICO. Or offers to swear.

Mr. SAUNDERS. If he establishes the fact of payment, Mr. Nelson, whether by the tax list or otherwise.

Mr. CARRICO. I claim the constitution fixes the right of a man to vote. I claim further, it goes on and, together with the statutes passed under it, fixes the proof, or how the man may prove his right to vote, and in no other way can he prove he has paid his poll tax.

Mr. HAMILL. Suppose, for instance, a man pays his poll tax and then goes off traveling and returns two days before election, and has not time to give the five days' notice and make his petition to the circuit court; would that debar him from voting, in your opinion?

Mr. CARRICO. If he was not on the tax list.

Mr. HAMILL. If he was not on the poll-tax list?

Mr. CARRICO. It certainly would, I think.

Mr. HAMILL. Is there no provision, such as they have in other States, whereby he may go to the court, or to some tribunal, even on election day, show he is qualified, and get a certificate entitling him to vote?

Mr. CARRICO. No, sir; the poll-tax list at the end of thirty days after it is posted is closed. Many men are disfranchised down there because they do not do that.

Mr. BENNET. The same is true in our State of New York. If a man is not in the city on one of the four days of registration—we only have four days—be he ever so qualified, he could not vote on election day.

Mr. CARRICO. Yes. It is the same way as to the poll tax down there. My contention is that the law requires that he be on there for the years that he is assessed or assessable with taxes, and that if he neglects that part of it, the result is that he can not offer any other proof than the tax-paid list that he has paid them, because the tax-paid list says, "Here is a list of all parties who have paid their poll taxes six months prior to the 3d day of May, 1908, in order to entitle them to vote." If that is a list of all of them, although he may have paid his taxes, and although he may have been entitled to get on there, but has neglected to go to the court and furnish the judges of election with the proof that the constitution and the statutes say he shall furnish them with, they are bound to exclude him from voting. He excludes himself.

Mr. BENNET. The contention as between you and Judge Saunders is, you contend that the constitution and the statutes prescribe an exclusive method of proof, and Judge Saunders contends that in addition to the tax list provided by the statute and the constitution other proof of payment can be adduced?

Mr. SAUNDERS. That is an absolutely correct statement of the difference between us.

Mr. CARRICO. Yes, sir; that is what Judge Saunders contends, and I contend that the constitution and the statutes preclude any other mode of proof; that the constitution says that this poll-tax list shall be conclusive evidence of the facts therein stated for the purpose of voting, and when it states that it is a list of all persons who have paid taxes, and this person being off the poll-tax list does not apply to the court within the thirty days which the law gives him the right to apply in, and does not place himself on the list, he is excluded from voting.

Mr. NELSON. That has never been decided by your courts?

Mr. CARRICO. No, sir; it has never been.

Mr. SAUNDERS. It has been decided in the nisi-prius courts.

Mr. HOWELL. What if an alien should pay his poll tax; would he be entitled to vote?

Mr. CARRICO. No, sir; our constitution excludes aliens from voting.

Mr. HOWELL. Who would pass upon the matter?

Mr. CARRICO. An alien who has not been naturalized can not vote.

Mr. HOWELL. I know, that is the general law; but what is the procedure in your state to determine the right of a man to vote, other than the paying of a poll tax? Is there any registration list?

Mr. CARRICO. Yes, sir; there is a registration list. He must be registered, must be over 21 years of age, and must have paid the poll tax, unless, as I say, he is an old soldier.

Mr. HOWELL. Then, if he is on the registration list and not on the poll-tax list, what would be his status?

Mr. CARRICO. If he is not on the poll-tax list and he does not furnish the evidence required by the constitution and the law, as I see it, even if he had paid his poll tax, he would be excluded from voting, although he would be on the registration list. It is not every man who is registered who is entitled to vote.

Mr. BENNETT. Does a man have to register every year?

Mr. CARRICO. No, sir. Our registration lists are preserved up to the time a man dies or moves away.

Mr. BENNETT. Can a man register any day in the year he pleases?

Mr. CARRICO. A man may register any day in the year he pleases up to within thirty days of the election. Thirty days before each election the registration books are closed, and no one can get on the registration books between that and the election.

The CHAIRMAN. Having once registered, he always remains a registered voter as long as he is in the county?

Mr. CARRICO. Yes, sir; he remains a voter as long as he pays his poll tax.

Mr. SAUNDERS. There is one exception to that, which will appear in this case. If a man goes out of the State and becomes a citizen elsewhere and then returns, his absence will strike his name from the registration books; he has to reregister in order to vote on his return. But mere absence from the State, without acquiring citizenship, does not affect his voting rights.

Mr. CARRICO. If he moves out permanently. A man who moves out temporarily without intending to make his home elsewhere does not have to.

Mr. SAUNDERS. That is what I mean.

The CHAIRMAN. After having once registered, as long as he remains in the county he is a qualified voter as long as he complies with the requirements of your constitution and state law?

Mr. CARRICO. Yes, sir; that is right. The evidence is very voluminous, and it is very hard to pick out who has paid his poll tax. There may be some mistakes in the brief of evidence; I notice there are some mistakes in ours, and I notice Judge Saunders has made some in his. In some instances we do not agree with the contention as to whether a voter is a legal voter or not on the evidence that is in the record. I think it would be hardly fair to the committee for me to take up each name and discuss it separately, because if I did I would have to discuss it all day.

Mr. HOWELL. When a voter presents himself to vote in your State, what do the judges refer to to determine his qualifications, the registration list or the poll-tax list?

Mr. CARRICO. They have the tax list and the registration books right before them; it is determined by both.

Mr. KORBLY. How is the fact that he was a soldier shown?

Mr. CARRICO. On the registration book there is a column there that says, "Is he exempt from the payment of poll taxes as a prerequisite to voting?" It is either "Yes," or "No," under that. If it is "Yes," it is supposed he is an old soldier, because they are the only ones who are exempt, and he is allowed to vote.

(Thereupon, at 12.05 o'clock p. m. the committee took a recess until 2 o'clock p. m.)

AFTER RECESS.

The committee met at 2 o'clock, p. m., pursuant to the taking of recess.

ARGUMENT OF J. H. CARRICO, ESQ., IN BEHALF OF THE CONTESTANT'S CONTENTION.

Mr. CARRICO. I want to refer back a moment to the Elliott Mathew question. I did not have the constitution before me at the time I was going over it. I want to read you a short portion of the constitution as to who is eligible to hold office in Virginia.

It says that the following persons shall be excluded from registering and voting:

Idiots, insane persons, and paupers; persons who, prior to the adoption of this constitution, were disqualified from voting, by conviction of crime, either within or without this State, and whose disabilities shall not have been removed; persons convicted after the adoption of this constitution, either within or without the State, of treason, or any felony, bribery, petit larceny, obtaining money or property under false pretenses, embezzlement, forgery, or perjury; persons who, while citizens of this State, after the adoption of this constitution, have fought a duel with a deadly weapon, etc.

That will not come up in this case. And then section 32 says:

Every person qualified to vote shall be eligible to any office in the State, or of any county, city, town, or other subdivision of the State, wherein he resides, except as otherwise provided in this constitution, and except that this provision as to residence shall not apply to any office elective by the people where the law provides otherwise. Men and women 18 years of age shall be eligible to the office of notary public, and qualified to execute the bonds required of them in that capacity.

That shows that a lunatic is not eligible to office at all, because he is excluded from registering and voting, and only people eligible to vote can hold office except the office of notary public, in which case persons at least 18 years of age, including ladies, may hold the office of notary public. Those are the only exceptions.

Now, gentlemen, as to the question of proof of whether a man has paid his poll tax as required by law, so as to qualify him to vote, as to the proof, I want to read you the constitution on that.

Section 38 of the constitution reads:

After the 1st day of January, 1904, the treasurer of each county and city shall, at least five months before each regular election, file with the clerk of the circuit court of his county, or of the corporation court of his city, a list of all persons in his county or city who have paid, not later than six months prior to such election, the state poll taxes required by this constitution during the three years next preceding that in which such election is held; which list shall be arranged alphabetically, by magisterial districts or wards, shall state the white and colored persons, separately, and shall be verified by the oath of the treasurer. The clerk, within ten days from the receipt of the list, shall make and certify a sufficient number of copies thereof, and shall deliver one copy for each voting place in his county or city to the sheriff of the county or sergeant of the city, whose duty it shall be to post one copy, without delay, at each of the voting places, and within ten days from the receipt thereof to make return on oath to the clerk as to the places where and dates at which said copies were respectively posted, which return the clerk shall record in a book kept in his office for the purpose; and he shall keep in his office for public inspection, for at least sixty days after receiving the list, not less than ten certified copies thereof, and also cause the list to be published in such other manner as may be prescribed by law; the original list returned by the treasurer shall be filed and preserved by the clerk among the public records of his office for at least five years after receiving the same. Within thirty days after the list has been so posted, any person who shall have paid his capitation tax, but whose name is omitted from the certified list, may, after five days

written notice to the treasurer, apply to the circuit court of his county, or corporation court of his city, or to the judge thereof in vacation, to have the same corrected and his name entered thereon, which application the court or judge shall promptly hear and decide.

Then it goes on to state:

The clerk shall deliver, or cause to be delivered, with the poll books, at a reasonable time before every election, to one of the judges of election of each precinct of his county or city, a like certified copy of the list, which shall be conclusive evidence of the facts therein stated for the purpose of voting. The clerk shall also, within sixty days after the filing of the list by the treasurer, forward a certified copy thereof, with such corrections as may have been made by order of the court or judge, to the auditor of public accounts, who shall charge the amount of the poll taxes stated therein to such treasurer unless previously accounted for.

This relates entirely to the proof that is to be offered, showing that the man has paid his poll tax, because the constitution in the winding-up clause says:

Further evidence of the prepayment of the capitation taxes required by this constitution, as a prerequisite to the right to register and vote, may be prescribed by law.

Now, then, if that did not have reference to the evidence that is to be adduced before the judges of election, showing the payment of the tax, it certainly would not say that further evidence of the prepayment of the capitation taxes required may be prescribed by law. The legislature has not seen fit to require any further evidence, but it does require that each man shall be on that tax-paid list if he does not come under the exemption by reason of being an old soldier or otherwise, or if he has not just become 21 years of age, in which latter case he votes on a certificate from the treasurer that he has paid his poll tax.

Now, gentlemen, assuming that I am correct in that position, you will find that a great many men voted at the different precincts throughout the district, whose names are too numerous for me to mention to the committee, and they will have to go over the names themselves. I shall mention a few of them, however, who voted without being on the tax-paid list; some of them swore that they paid their poll tax, others produced tax receipts that they had paid their poll tax, while others came in and simply said, "I have paid my poll tax," and on that showing the judges allowed them to vote.

Mr. NELSON. Is this construction that you are laying down here something new, or what has been the practice by Republicans or Democrats as to voting by showing that they had at some time or other paid the poll tax before election?

Mr. CARRICO. Well, sir, I can not answer that except as to my own county.

Mr. NELSON. Well, as to your own county?

Mr. CARRICO. As to my own county, a man whose name does not appear on the poll-tax list and who the registration books shows has been registered, or is old enough to be on there, is excluded from voting.

Mr. NELSON. That is the fixed rule in your county?

Mr. CARRICO. Yes; that is the fixed rule in my county. Neither Republicans nor Democrats are allowed to vote unless their names appear on the poll-tax list. I say that is a fixed rule; it does not hold good at every precinct in the county.

Mr. NELSON. You are speaking of your own individual precinct?

Mr. CARRICO. Well, it is the contention of both parties in my county that that is the rule, but the judges of some precincts do not adhere to that rule.

Mr. NELSON. That is what I wanted to find out.

Mr. CARRICO. The fact that a man is on the registration books, as I said previously, is not conclusive evidence that he has a right to vote. I think we are agreed on that. [Reading:]

SECTION. 21. Any person registered under either of the last two sections shall have the right to vote for members of the general assembly and all officers elective by the people, subject to the following conditions:

That he, unless exempted by section 22, shall, as a prerequisite to the right to vote after the 1st of January, 1904, personally pay, at least six months prior to the election, all state poll taxes assessed or assessable against him under this constitution during the three years next preceding that in which he offers to vote: *Provided*, That if he registers after the 1st day of January, 1904, he shall, unless physically unable, prepare and deposit his ballot without aid, on such printed form as the law may prescribe; but any voter registered prior to that date may be aided in the preparation of his ballot by such officer of election as he himself may designate.

Mr. BENNET. Is the poll tax uniform throughout the State, and does every man know the amount, or does it vary?

Mr. CARRICO. It is fixed at $1.50.

Mr. BENNET. For each individual, each year?

Mr. CARRICO. For each individual, each year. Now, according to Judge Saunders's contention, the judges of election would be the judges of what evidence was sufficient to qualify a man to vote in the event that his name does not appear on the poll-tax list. But the constitution is different. The constitution says that the legislature and not the judges of election may prescribe by law a different method of proving that the man is entitled to vote. The legislature has not done it. I take it if the constitution gives only to the legislature that right, it certainly does not give it to the judges of election to say what manner of proof they will receive as to whether a man is qualified to vote or not. Therefore I take it that the constitution, the legislature not having acted on it, having passed no laws giving any other mode of proof, that therefore the constitution is conclusive and the laws passed under it quote the language of the constitution in saying what proof shall be made as to the payment of the poll tax in order that a man may be allowed to vote.

Mr. NELSON. How many general elections have you had under that constitution?

Mr. CARRICO. The constitution was adopted in 1902, and we have an election about every year.

Mr. BENNET. Assuming that your contention is correct, and that the judges of election had no right to allow any one to vote unless he was on the tax-paid list and that enough men did so vote to change the result here, how could this committee ascertain how a man who voted in violation of the statute voted when he went in the booth?

Mr. CARRICO. That was the question I was coming to now. That is a very hard matter to determine, because in our State it is a secret ballot and you can not compel a man to come forward and testify as to how he voted. Therefore the only way we could get at it in many instances was to prove their politics, to prove with what party they affiliated, what party was advocating and maintaining their right to vote. That is what we did, so far as we could. In a great many instances you will find that it has been proved how a man voted;

either he testified himself or the next best evidence was obtained, that he told some one, or he said at the election how he was going to vote or how he did vote. As to that McCreary on Elections (sec. 490, p. 361) says:

> Where a voter refuses to disclose or fails to remember for whom he voted it is competent to resort to circumstantial evidence to raise a presumption in regard to that fact. And within this rule it was held in People *v.* Pease (27 N. Y., 45) "in the absence of direct proof, evidence showing to what political party a voter belonged, whose election he advocated, whose friends maintained his rights to vote," and kindred testimony has been held admissible.

Now, then, you will find further that in Pittsylvania County the contestant in his direct testimony asks the witnesses if certain parties were on the permanent roll. I should explain about the permanent roll. After the adoption of this constitution in 1902, there was in each magisterial district of the county a registration board appointed, composed of three people, who registered all parties entitled to register. There was a new registration, a general registration of the State, and all parties then were registered. Old soldiers were allowed to register, sons of old soldiers were allowed to register, and then other parties came in under an educational qualification. That is, they had to be able to read certain sections of the constitution and explain them to the satisfaction of the board before they were allowed to register. Of course, that was intended to cut out the negro; but it cut out a good many white men. The electoral board of registration which was appointed continued for two years. They continued up to 1904. The list of the people that they put on the registration list is called the permanent roll. Those people on the permanent roll of course must have paid their taxes three years before the election, because they had to get on the roll prior to 1904. Now, the contestee, in his brief, says that it is not shown for what purpose these people were attacked, but they could have been attacked for no other purpose, because the poll-tax list was filed here showing that they were not on that poll-tax list, and they were asked the question whether they were on this permanent roll, to show whether they were entitled to vote, whether they had paid taxes for three years, and if they are not on the poll-tax list for three years and are on the permanent roll, it is conclusive evidence that they have not paid the poll tax required of them. And, further, the registrar was placed on the stand by contestee's counsel and asked if he had his books there, and he was asked if they were not young men who had just become of age, or if they were not registered as old soldiers. Those registrars, of course, placed as many of those on the list as they could—that is, these young men that I have referred to, who had just become voters, or old soldiers or sons of soldiers.

McCreary says:

> In purging the polls of illegal votes the general rule is that unless it be shown for which candidate they were cast they are to be deducted from the whole vote of the election precinct, of course in the application of this rule such illegal votes would be deducted proportionately from both candidates according to the entire vote returned for each from said precinct.

In many instances, it is not shown how the party voted or what their politics were. In that instance, I take it, taking the precinct and taking the vote for that precinct, that you deduct from each one in proportion to the amount they received at that precinct. At

Stokesland precinct and at Keeling precinct, in Pittsylvania County, the contestant did not receive any votes. So I suppose all the illegal votes there would be counted from the contestee's majority, because certainly the contestant got no benefit from it. In several other precincts there he would get from 1 to 6 votes, while the contestee was getting all the way from 30 to 80 votes. There were a great many of them at Kentuck precinct. I had a list here which I found in the brief filed with the committee, showing that they are illegal voters. As I say, in these counties the tax-paid list will have to be consulted along with these briefs, showing that they are not on there. At Kentuck precinct there are 17 who voted without having paid the proper amount of poll tax and without their names being on the poll-tax list for the requisite number of years, because they are nearly all shown to have been on the permanent registration list, which is conclusive evidence that they should have paid for three years.

The CHAIRMAN. How many votes did Mr. Parsons receive there?

Mr. CARRICO. The contestee received 67 and the contestant 4.

Mr. BENNET. What county is that?

Mr. CARRICO. That is the Kentuck precinct.

Mr. BENNET. In Pittsylvania County?

Mr. CARRICO. Yes, sir. At Ringgold precinct in Pittsylvania County, 14 persons voted without having been on the tax-paid list, and most all of them are on the permanent roll of voters and should have paid for three years. They may appear on the tax-paid list for one or two years, but they are not on there for three years. They have not paid their taxes for three years, and consequently they are illegal voters. At that precinct the contestee received 70 and the contestant received 5 votes.

Mr. BENNET. In Kentuck, Mr. Saunders received 77 votes and Mr. Parsons 4.

Mr. CARRICO. At Ringgold precinct, in the same county, where there were 14 illegal votes, the contestee received 70 votes and the contestant 5 votes.

The CHAIRMAN. How many votes in that precinct were challenged by reason of nonpayment of taxes?

Mr. CARRICO. Fourteen.

Mr. NELSON. That is, that many that you would call illegal?

Mr. CARRICO. Yes. There were more than that challenged, but at the time they were challenged they were not on the poll-tax list for the proper number of years; but the contestee in his evidence summons the registar and shows that some of them were young men and some of them were old soldiers. But of these 14 the registrar could not testify that they were either young men or old soldiers, and consequently they should have paid the tax.

Mr. BENNET. How many votes were there cast at Keeling precinct——

Mr. CARRICO. Six illegal.

Mr. BENNET. When you say illegal, you mean men that were not on the tax-paid list?

Mr. CARRICO. Men that were not on the tax-paid list; yes, sir.

Mr. BENNET. In that precinct, Mr. Parsons had no votes at all.

Mr. CARRICO. Mr. Parsons had no votes; no, sir. Neither did he have any at Stokesland precinct, in which there were 6 illegal votes, and 6 at Keeling. At those precincts Mr. Parsons received no

votes at all. At Laurel Grove there were two men not on the tax-paid list who voted, and the contestee received 48 votes and the contestant 1 vote.

At Cedar Hill precinct, in Pittsylvania County, there were 4 votes that were illegal and the contestant received 2 votes and the contestee 20 votes.

At Dry Fork, in Pittsylvania County, which went Republican, it is shown that there were 27 voters who voted without being on the tax-paid list. That was shown by the contestee's evidence. But the contestant on his rebuttal evidence shows that 16 of these parties were either old soldiers or young men who had just come of age and not entitled to be on the tax-paid list. Eleven of the parties who were shown by the contestee not to have been on the tax-paid list are shown to be strong Democrats. The politics of one of the parties is not shown.

And it goes that way all through the list.

Now, then, in Grayson County, at Pugh Place precinct, a man by the name of Quillen offered to vote. He had secured his transfer thirty days before the election, as required by law, and he offered it for registration on the day that the Democratic registrar had set for registration. But the registrar, finding that he had set less than thirty days before the election for registration, refused to register anybody, and he refused to register his transfer.

But our statutes say that where a transfer is secured thirty days before election it may be offered on the day of election in the same county in which it is secured and be voted on without being registered, and the judges of election will place it on the registration books. This man Quillen tried to vote, offered to vote for contestant, but was refused.

The contestee in his brief says it was illegal for the registrar to refuse to register him, because it was less than thirty days before the election when he offered to register. I agree with the contestee there. But still this man was a legal voter when he tried to vote on his transfer, because he had that right. But the contestee is not quite consistent at the same place, because a Democrat by the name of Young offered to register there and he says he should have been registered on the same day, and that he would have voted for contestee. I grant you that. But I want to be consistent. I say he has no more right to register than the man with the transfer, and we claim that the man with the transfer had no right to register because our law says a man must register thirty days before his election.

At Rugby precinct there were two parties who offered to vote for contestant and whose names were not on the registration list. Rugby was a new precinct which had been taken from the Mouth of Wilson precinct and had been taken from the Pugh Place precinct. Our law provides and makes it mandatory on the registrars at the two precincts from which the new precinct is taken to furnish the registrar of the new precinct with a list of all the voters who are on his books that are within the new territory, and that he shall place them on the books, and that they shall be entitled to vote without any effort on the part of the voters. Now, then, these parties were registered in the Pugh Place precinct. They live within the new territory. It was the duty of the registrar to furnish their names to the new registrar, and they should have been on the registrar's books. Therefore they are legal

voters and they should have been received and registered on that day by the judges of election.

We claim that the contestant is entitled to those votes.

There are a good many more points I could go over and name at these different places.

As to the tax-paid list, the contestee claims that in Grayson County a good many men were on the tax-paid list, written on there in red ink. Now, that is true, and very naturally so. The clerk has this list printed when it is furnished to him by the treasurer for the purpose of having it posted for the thirty days. That is posted for thirty days, and men who have paid their poll tax, finding their names are not on the list, apply to the circuit court to have their names placed on the list, and when the court sends in that order the clerk naturally, not wanting to put the county to the expense of printing a new list, which would cost some fifty or sixty dollars, simply places them on there with pen and ink—places their names on the list, and they go to the judges of election, furnishing them with the evidence as to who is qualified to vote.

At Comers Rock precinct there were either four or five men on there with their names written on the list. The list was duly certified out to the judges as being a proper list for them to be guided by as to who was qualified to vote. They received the list, as required by law, from the clerk, along with the ballots, and they had that list there, and none other, to go by as proof, but still they were challenged and not allowed to vote at that precinct.

We claim that contestant is entitled to those votes. They offered to vote for the contestant and their names were properly on the list; but because they were written in ink the Democratic judges refused to let them vote. At the same precinct two or three Democrats whose names were written with ink on the tax-paid list were allowed to vote. That is all shown in the record.

Mr. BENNET. How many votes come under that class—I mean whose names appeared on the tax list in red ink, who were not permitted to vote?

Mr. CARRICO. If I mistake not, five at Comers Rock. I do not recall now, but my brief will show each and every voter that was so refused.

The CHAIRMAN. Have you taken the testimony of these men who appeared?

Mr. CARRICO. We have taken the testimony of some of these men who appeared and offered to vote, and then we have taken the testimony of the Republican judge of election over there, showing that they appeared and said they wanted to vote for the contestant and they were refused the privilege of voting there.

Mr. SAUNDERS. Would you point out to the committee that part of the record which shows that these people at Comers Rock offered to vote for contestant?

Mr. CARRICO. Yes; I will do that.

Mr. SAUNDERS. You will find it referred to in contestant's second brief, pages 323 and 324 of the record. Show wherein those people say they would have voted for the contestant.

Mr. CARRICO. They were shown to be Republicans.

Mr. SAUNDERS. Well, I will admit that; but show that they offered to vote and were rejected. Please show that they said they would have voted for Parsons if they had been allowed to vote.

The CHAIRMAN. What were their names?

Mr. SAUNDERS. S. K. Fielder, J. W. Hall, and Bob Catron.

Mr. CARRICO. I will refer you to page 633 of the record. P. K. Catron testifies, and his testimony will be found at that page of the record. Robert Catron was one of the parties referred to, and his father states as follows:

Q. Was there any voters desiring to cast their ballots that day challenged and rejected at your precinct?
A. Yes; there was some.
Q. State who they were and for whom did they intend to vote?
A. One was my son, Robert Catron. I don't know that any of the others that were objected to come in, and they intended to vote for Parsons for Congress.
Q. Did W. E. Hall vote there that day?
A. I don't think he did.
Q. Why did he not vote?
A. He was challenged.

Mr. SAUNDERS. Hall was challenged on a different ground. His name could not be found, and while they were looking for it he got away. But I refer to the people that you say were rejected because their names were in red ink. If it is not disturbing you, I would like to have you point that out.

Mr. CARRICO. I don't know that they said they would vote for contestant; they said they were Republicans, and my recollection is that the record shows that they went there for the purpose of voting and were challenged.

The CHAIRMAN (reading from the printed record of testimony, p. 323):

Q. What are the politics of the said Andy Sells, and whom was he supporting for Congress in the last election?
A. He is a Republican, and was supporting Mr. Parsons.

Mr. SAUNDERS. It does not say that they offered to vote at all.

Mr. BENNET. W. S. Cornett testifies (p. 634):

Q. Did W. E. Hall vote there? If not, why not, and what was his politics, and for whom did he wish to vote?
A. No; he was challenged; he was a Republican; he would have voted for Parsons for Congress; he told me so.

Mr. SAUNDERS. That is not embraced in this inquiry that I addressed to Mr. Carrico. It has a different foundation. Hall was in this fix: Hall was entitled to vote all right, but they could not find his name. It was in the wrong place. The judges could not find his name, and while they were looking for him he got out of the place. When they called him, he had gone.

Mr. BENNET (reading from testimony, p. 634):

Q. Do you find W. E. Hall tax paid in name of W. E. Hall or Ellis Hall?
A. W. E. Hall; he goes by name of Ellis Hall; was trying to find it in name of Ellis Hall; found it in name of W. E. Hall.

The CHAIRMAN. Proceed, Mr. Carrico.

Mr. CARRICO. The record shows that these people were there for the purpose of voting, I think. This man Cornet was a Democratic challenger there. They may not have gone in to vote, but some of them did. This fellow, Catron, was there in red ink. He went in to vote, and his father says he was challenged and refused the privilege of voting. Probably all did not vote, but they were there for that purpose, and the evidence shows that they were strong Republicans.

I think, clearly under the law of the case, wherever their politics are shown to be strongly Democratic that that is a good index to go by that they voted for the contestee, and vice versa where they are shown to be strong Republicans.

There is one other thing, and then I am through, and that is as to the taking of Floyd County out of the fifth district.

I am only going to discuss two or three points on that, and I will be through. I would like for the committee to look at this map. [Producing map.] There is Floyd County. There was the fifth district as originally composed. It is testified to in the record that it is about 10 miles from this point [indicating] to the North Carolina line.

Mr. NELSON. What is the length of the Sixth district?

Mr. CARRICO. I could not tell you. Floyd County was taken out of the Fifth district and placed in the Sixth district. Floyd was in the Fifth district. I will show you the lines, the boundaries, of the old Fifth district. [Indicating on map.] The lines of the new Fifth district are these [indicating]. They just took that county out and added it to the Sixth district.

The CHAIRMAN. Who prepared that map?

Mr. CARRICO. That was prepared in Floyd County. I don't know who prepared it—one of the witnesses.

The CHAIRMAN. Is there any controversy as to whether that is the correct map?

Mr. CARRICO. I think not; I think Mr. Saunders will concede it.

Mr. SAUNDERS. That is substantially correct. You will find the same outlines in the Congressional Record; this is simply on a larger scale.

Mr. CARRICO. And there is evidence in the record that this is about 10 miles across here [indicating]. That is not controverted. It is further shown in the record that that 10 miles is composed of a mountain spur and there are no means of communication, by road or otherwise, from Carroll County into Patrick County.

The CHAIRMAN. Does not the record also show that there is a communication; are there not some witnesses who testified that there are roads through that portion?

Mr. SAUNDERS. There is a turnpike up to Floyd court-house, and a turnpike leads to Stuart, the county seat of Patrick County, from Carroll.

Mr. CARRICO. Witnesses who live there testify that there are no roads and no means of communication.

Mr. SAUNDERS. You go by Mayberry and the Meadows dam.

Mr. CARRICO. When you go by the Meadows dam, you go on the Danville pike, which extends from Stuart around through Floyd County into Carroll County. The witnesses testify that there is no public road there connecting one end of the district with the other.

Mr. SAUNDERS. There was a witness who testified to that, but we say that, as a matter of fact, that is not correct.

Mr. CARRICO. So far as I know, it is correct.

The CHAIRMAN. Well, that is not material.

Mr. CARRICO. Here is the law that I wanted to call attention to. This is section 55 of the constitution of Virginia:

> The general assembly shall, by law, apportion the State into districts, corresponding with the number of Representatives to which it may be entitled in the House

of Representatives of the Congress of the United States, which districts shall be composed of contiguous and compact territory containing, as nearly as practicable, an equal number of inhabitants.

Mr. BENNET. That is the constitution of Virginia?

Mr. CARRICO. The constitution of Virginia, section 55. The language of the federal statutes is identical with the constitution of the State, saying that the districts shall be composed of contiguous and compact territory and containing, as nearly as practicable, an equal number of inhabitants.

Mr. NELSON. Is the wording identical?

Mr. CARRICO. The wording is identical with the act of Congress passed in 1901, I think, making the apportionments.

Mr. TOU VELLE. Do I understand you correctly to say that the wording of your constitution is the same as the wording of the act of Congress?

Mr. CARRICO. Yes; that portion of it—that is, "which districts shall be composed of contiguous and compact territory, containing, as nearly as practicable, an equal number of inhabitants."

The act of Congress passed in 1901 says the same thing.

I do not think that the contestee in this case can consistently claim that the taking of Floyd County from the fifth district and adding it to the sixth district will make the fifth district more compact, because it clearly shows that it leaves it less compact.

The federal census in 1900 showed a population in the fifth district, including Floyd County, in round numbers, of 175,000; and it showed in round numbers that the sixth district, exclusive of Floyd County, had a population of 187,000—12,000 more than the fifth district. Floyd County contains something like 15,000 inhabitants.

Mr. NELSON. What was the unit of population for congressional districts under the apportionment of 1908?

Mr. PARSONS. 185,000.

Mr. NELSON. How much was the sixth district over the unit?

Mr. CARRICO. In the census of 1900 the sixth district was 12,000 larger than the fifth district, before Floyd County was taken out of it.

Mr. BENNET. It was 2,000 over the unit?

Mr. CARRICO. Yes; it was 2,000 over the unit. Now, it certainly was not to equalize the population, because it is shown in the record here that in 1900 the sixth district had 187,000 and the fifth district 175,000. It is shown further in the record that up to the time of the passage of this act taking Floyd County out of the fifth district and placing it in the sixth district that the sixth district had grown in population greater than the fifth. The fifth district is a rural district. It has only one large town in it, the city of Danville. Roanoke is right near the borders of the fifth district. Roanoke city is not located on the map here, and it has drawn very largely from the fifth district. That is shown in the record. So that certainly the population in the sixth district up to the time of this taking of Floyd County out of the fifth and placing it in the sixth had increased more than the fifth, and therefore the disparity in the population was greater at the time they took it out than the census of 1900 shows. The census of 1900 showed that the sixth district was larger than the fifth, with Floyd County included in the fifth. It could not have been for that reason. It is conceded by the contestee here that this committee has the same right as a court

to pass on these things. Then if they have, the courts have passed on this and it will be argued by my associate counsel more at length and cases cited where it is shown that the legislature has disregarded the constitutional mandate; they have neither tried to make the territory more compact nor have they tried to equalize the population; they have disregarded those provisions. They have lost sight of the constitution, and the courts will intervene and declare the acts null and void in such cases.

Now, if it is conceded that this committee has the same right, we ask that this committee exercise that right; and that the committee say that the legislature of Virginia had lost sight of the constitutional provision when it took Floyd County out of the Fifth District and placed it in the Sixth District, and that they left the Fifth District less compact. They added to a stronger district and took away from a weaker district. Therefore, they lost sight of equalization in population, and I might add, gentlemen, that they lost sight of everything; but it seems a partisan way of getting votes.

We have extracts taken from the Democratic press, which are filed with the record, which I would like to have the committee read.

Mr. NELSON. What do you mean by the Democratic press? Do you mean local papers or the metropolitan Democratic papers?

Mr. CARRICO. The metropolitan Democratic papers; the Roanoke Times, being the organ of southwest Virginia Democracy; the Richmond Times-Dispatch; the Richmond Journal; the Richmond News-Leader.

Mr. NELSON. In substance, what do they say, without going into it in detail?

Mr. CARRICO. In substance, they say it is a gerrymander for political purposes only; that it is not for the good of the State, and it says that the Democratic party may rest assured they will be called to account for it; that the spirit of the new constitution has been violated; that it was intended for the purpose of excluding the negro vote, which it did; and it was now left for the white men of the State to settle the political questions and that the Democratic party would be in a bad hole if they substitute legislation for apathy in their party in order to hold their Members in Congress. That is the substance of it.

Mr. TOU VELLE. How did the district go, as it now is?

Mr. CARRICO. Exclusive of Floyd County?

Mr. TOU VELLE. In the presidential election?

Mr. CARRICO. President Taft carried it by 11 votes. That was exclusive of Floyd.

Mr. BENNET. Including Floyd, how did it go?

Mr. CARRICO. Including Floyd, I think it went about 1,100 for Taft.

Mr. NELSON. You say that the present district, the fifth district, went for Taft?

Mr. CARRICO. Yes, sir; it went for Taft by 11 votes.

Mr. HOWELL. Including Floyd?

Mr. CARRICO. No, excluding Floyd County; and by about 1,100 including the vote of Floyd County.

Mr. KORBLY. Is it your contention that the legislature is bound to follow county lines in making a district?

Mr. CARRICO. Oh, yes; I think so.

Mr. KORBLY. What is the basis or authority for the claim that they are bound to follow county lines?

Mr. CARRICO. I can not just lay my hand on the statute, but the statute provides that they shall have regard to county lines in redistricting the State. I will look that up a little later and show it to you. They can not divide a county in redistricting.

Mr. NELSON. Was the county of Floyd the only county, or was there some other county——

Mr. CARRICO. The county of Craig was taken from the ninth district and placed in the tenth district. This is the second time that the legislature of Virginia has redistricted under the 1900 census. In 1902 the legislature passed an act redistricting the State; and at that time, besides making some other changes, it added the County of Halifax to the fifth district. Halifax is due east of Pittsylvania County and would be at the eastern extremity of the district. That county is largely Democratic. That was added to the district, but that was in Mr. Glass's district and it didn't suit him, and the governor at that time, Governor Montague, vetoed that bill, as the legislature, he thought, had violated the constitution, as I have shown you, in that it did not make a more compact territory and did not equalize the population.

Then in 1906 the State did redistrict, in which a county was taken from the second district, I believe, and added to the first.

In all those bills, every district in the State was bounded and each county mentioned. And then in 1908 they redistricted again and took Floyd County out of the fifth and placed it in the sixth district, and Craig out of the ninth and placed it in the tenth district.

Mr. NELSON. What effect did the shifting of Craig County have on the population of the respective districts?

Mr. CARRICO. The County of Craig was a Democratic county and the tenth district at one time had a Democratic Congressman here, Mr. Yost, and it was probably to strengthen the Democrats in that district; so Craig was taken off from the ninth, which was largely Republican and placed in the tenth.

Mr. NELSON. Can you give me the units of population and the figures?

Mr. SAUNDERS. I can give you the population of each district in the State.

The CHAIRMAN. When was it that the State was apportioned and the bill was vetoed by the governor?

Mr. CARRICO. That was in 1902.

The CHAIRMAN. That was the first apportionment under the new constitution?

Mr. CARRICO. That was the first apportionment. That was vetoed, and then in 1906 there was another redistricting of the State, which was approved by the governor and which became a law. Then, in 1908 there was a further readjusting, and before this election. And that was approved by the governor. There were three attempts, and two successful attempts, to redistrict the State under the same census; and, as I say, I think that that violates not only the federal statutes which provide for the State's redistricting and election of representatives, because it does not make the territory more contiguous or compact, but it violates the constitution as well—if not the letter, at least the spirit of the constitution—and the federal statutes providing for

the redistricting. As a matter of fact, it has cut the fifth district in two, so far as communication is concerned. There can be no direct communication from one end of the district to the other, according to the evidence in the case. I take it that it is correct, because it is from men who live in that part of the district. I am not familiar with the situation myself, except as to the Danville pike coming from Stuart into Carroll. I know you have to go into Floyd County in going that way. I know I have always gone either that way or around through North Carolina. And I am told by people who live there that there is no practical route through this mountain spur except through the sixth district as now composed, or around through North Carolina. So, if not in fact, it in spirit violates the constitution in that the territory is not contiguous.

With that I submit these questions to the committee. I thank you.

(At this point, 3.15 o'clock p. m., the committee took an informal recess for fifteen minutes.)

Mr. THURSTON (after the committee reassembled). I have the pleasure of introducing ex-Governor Montague, of Virginia, who will proceed with the further argument of the case in behalf of the contestant.

ARGUMENT OF HON. A. J. MONTAGUE, IN BEHALF OF THE CONTESTANT.

Mr. MONTAGUE. May it please you, Mr. Chairman and gentlemen of the committee, I wish to address myself to the invalidity of the apportionment act of 1908. I shall not discuss any other questions in the case. I am not prepared to speak upon them, and I will have to forego any argument upon any of those questions which have been touched or may hereafter be touched by my associates.

I wish first to submit to the committee a proposition which I think strikes in limine the whole case under consideration, namely, that when the legislature has under a given census or enumeration made an apportionment it exhausts its power to make another apportionment until there be a recurrence of the enumeration.

I need not suggest to this committee that this question is wholly a federal or national question. It was largely discussed in the Convention of 1787, and the subject of apportionment of representation and the method of representation came very nearly splitting the body two or three times. Madison observes in his second volume, 752, that whatever reason might have existed for the equality of suffrage when the Union was a federal one among the several States must cease when a national government should be put into its place. By the language "equality of suffrage" he meant that the equality of state suffrage when the Union was a federal one under the articles of federation must cease when a national government should be put into its place.

It was said time and again by the eminent publicists of that day that this representation by numerical apportionment was given to the National Government and not to the States, in order that the former might preserve itself should exigencies arise.

I think it will be conceded that neither under the Constitution of the United States nor the constitutions of the several States has

districting ever yet been held to be lawful without an express constitutional provision to that effect. (2 Bartlett Contested Election Cases, p. 55; also, 12 N. J. Law, 363.)

Now, I am aware that there is a precedent, a political precedent as contrasted with a judicial precedent, and I do not mean to disparage it by making that distinction—in what is known as the Perkins case. I suspect the committee is more familiar with it than I am.

The CHAIRMAN. Is it the New Hampshire case?

Mr. MONTAGUE. The case of Perkins *v.* Morrison. It is quoted in Hinds' Precedents, and also in 1st Bartlett, and perhaps some other places. In that case I think the question was raised that a second apportionment under a census was an illegal apportionment. I think, however, it should be said that it is a partisan report, and decided by party lines. Before I leave that case, I beg the attention of the committee to this point. At that time the committee in considering the question did not have the benefit of the decisions of juridical bodies throughout the country dealing with almost identical provisions in state constitutions and apportionments thereunder of legislative and judicial districts. I say that because I am persuaded that if that question were a question of first impression before this committee you would decide, almost as a rule of stare decisis, that the whole logic and necessities of the case would require a departure from the rule therein laid down and an adherence to the law which I shall quote before I conclude.

There the case went off on section 4 in Article I of the Constitution, bringing it under this classification:

> The times and places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof.

In other words, holding that apportionments or districting was a manner of "holding elections." I submit to this committee that if it were a question of first impression, it would be your conclusion, the inevitable conclusion, that the "holding of elections" is not the making of apportionments, and that the "holding of elections" is not the districting of a State; that the "holding of elections" relates mainly to a ministerial and judicial function; that the "holding of elections" means the conduct of an election; and it would be absurd to speak of the conduct of an apportioning or the conduct of a districting.

Therefore, the clause which was invoked there did not support the premise; and the premise being false, the conclusion necessarily falls with it.

The "holding of elections" must relate to the subject of voting and the methods of voting. When this case of Perkins *v.* Morrison was heard, in my own State, if I am not mistaken, many of the electors had one and two and even three votes in some instances. An elector could vote wherever he had land. He had a personal vote and he had a property vote as well. It was not the purpose of the Federal Government to interfere with that. It was not the purpose, as I understand it, to interfere with whether the vote should be viva voce or secret; whether it should be wholly by human operation or by voting machines or what not. The "holding of elections" ex vi termeni, has no relation to the subject of apportionment or districts. The election, if it please the committtee, is the instru-

ment whereby the citizen delegates his authority. The apportionment and district is a political subdivision, a marking off a given group of people according to an enumeration, who possess political powers—that is all that the apportionment can possibly mean—and grouping within a district according to numbers, as nearly equal as it may be.

The statute then in force as to districting, which had gone in effect shortly before that, was not, if I read it correctly, what the present statute is—the act of February 16, 1901. Take the section 4 of the latter act. I will read it:

That in case of an increase in the number of Representatives which may be given to any State under this apportionment, such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law, until the legislature of such State, in the manner herein prescribed, shall redistrict such State.

I read this for this purpose, that here is a distinct affirmative statement that until the redistricting the districts shall remain as they are now, the idea being all along that apportionment and enumeration are complements of the same power; they are each essential to the exercise of the other; that it would be folly to have an enumeration, so far as representation is concerned, without an apportionment; and likewise it would be impossible to have an apportionment without an enumeration; that the two constitute one and the same exercise of power, each being essential to the other. When you have an enumeration you must have an apportionment, and when you have an apportionment you must have a precedent existing enumeration. When you have an apportionment, you mean that that apportionment proprio vigore, occurs under an enumeration. They are both carrying powers. They both are the time and mode of doing one thing; and it is horn book law that when you do a thing at a time and according to a mode prescribed you consume the power in doing the thing; the power is thereby exhausted, and the legislature is functus officio to exercise that power after getting through with it.

Take the case here. I will read the statute:

And if there be no increase in the number of Representatives from a State, the Representatives thereof shall be elected from the districts now prescribed by law, until such State be redistricted as herein prescribed by the legislature of said State.

Take that language and extract from it either plural enumerations or plural apportionments. When the act says the districts shall remain as they are, the idea of a single enumeration alone is meant; and when you say that they shall remain as they are, until you have another act to transform it into something else, that transforming or reapportioning must necessarily be a single act, and its plural exercise is, in the nature of things, forbidden.

The case of Perkins *v.* Morrison is the only case that I have been able to find that sustains the contention of plural apportionments. And here the exhaustion of power is only indirectly discussed. That, I believe, was in 1850 or somewhere about that time.

The CHAIRMAN. There is a case in North Carolina——

Mr. MONTAGUE. Yes; I will come to that. That case, unless I am mistaken, does not involve a second apportionment under the same census; it was a repeal of an apportionment under a prior census by the act of making an apportionment under a second census, a distinction that should be borne in mind; there the question was not the

exhaustion of power by reason of the former apportionment—and we must always take decisions as to the facts upon which they are based—but whether the successor of the Member whose decease or resignation occasioning the unexpired term should be elected in the district of the original representative or from the new district, for both apportionments were valid.

Mr. SAUNDERS. You are speaking of the case of Brown *v.* Poole?

Mr. MONTAGUE. Yes.

Mr. SAUNDERS. Was not that same case presented in the case of Morrison *v.* Perkins?

Mr. MONTAGUE. No; I think not.

Mr. SAUNDERS. Yes; that part of it was just the same.

Mr. MONTAGUE. I think not. But if Judge Saunders is correct, my position is stronger, because my contention is, my understanding of the Morrison *v.* Perkins case is, that there the second apportionment was under the same census as the first apportionment. In the Poole case there is no plural apportionment under the same census.

Mr. SAUNDERS. In both of those cases the vacancy was not in the same district where the first vacancy took place.

Mr. MONTAGUE. That may be true; but the point I am trying to convey is this, that you can act only once under one enumeration or census.

The CHAIRMAN. And in the New Hampshire case, they acted twice.

Mr. MONTAGUE. Yes; and in the North Carolina case they only acted once. In the case of Hunt *v.* Menard, the comment of Mr. Hinds, speaking of the Morrison-Perkins case, at page 179, is this:

> The doctrine of this case was reversed by case of Hunt *v.* Menard (2 Bart., 477), although the latter was complicated somewhat by another question of fraud.

The comment here is that that case was reversed by Hunt *v.* Menard. I am frank to say that it is not my construction that it was wholly reversed. I think it reversed upon one point in Perkins *v.* Morrison.

I beg to accentuate again this contention; that the case of Perkins *v.* Morrison stands alone, and that it has not been affirmed by subsequent action of Congress, so far as I have been able to find.

In the case cited in the brief of Denny *v.* The State (144 Ind., 503), decided in 1895, I will read the syllabus, which is the same as that contained in the body of the case—because I wish to expedite the argument. [Reading:]

> A valid apportionment law can be passed only once for each enumeration period, under our State constitution, Article IV, section 4, providing for the enumeration every six years, and section 5, requiring an apportionment at the session next following the enumeration.

There is no affirmative expression there against reapportionment within six years. I have a case here, an Illinois case, which is precisely on all fours with this case in its chief features and the real essential principles involved; it turns upon the statement I made a while ago, that when the mode and the time are prescribed and you have complied with that requirement, the legislative power is exhausted, and its further exercise is ultra vires until the time and the way occur for it again to be done.

I will read section 5 of the constitution of Indiana. [Reading:]

The number of Senators and Representatives shall, at the session next following each period of making such enumeration, be fixed by law and apportioned among the several counties, according to the number of the male inhabitants above 21 years of age in each; provided that the first and second election of members of the general assembly shall be made before the adoption of this constitution.

As the committee will see, there is no express language prohibiting a further apportionment. It gives the right to make one in six years, but does not prohibit two in six years. And yet, the court holds that when the act is once exercised thereunder, it can not be repeated until the subsequent enumeration has been made, and then only one apportionment can be made thereunder.

Mr. NELSON. In that case, did they attempt to reapportion in the six-year period?

Mr. MONTAGUE. Yes; they attempted to make two, and the second one was held invalid.

The CHAIRMAN. That was under the state law of Indiana?

Mr. MONTAGUE. Yes; under the state constitution.

Now, I come to the Illinois case. The article in question is in these words (Art. IV, sec. 6, constitution of Illinois):

SEC. 6. The general assembly shall apportion the State every ten years, beginning with the year 1871, by dividing the population of the State, as ascertained by the federal census, by the number 51; the quotient shall be the ratio of representation in the senate. The State shall be divided into 51 senatorial districts, etc.

This language applies to senatorial apportionment, and the language is substantially that of the Constitution of the United States.

Mr. SAUNDERS. What case is that?

Mr. MONTAGUE. I beg your pardon; I thought I had given it. It is the case of People ex rel. William Mooney *v.* Hutchinson (172 Ill., 486).

Mr. SAUNDERS. That has not been cited heretofore.

Mr. MONTAGUE. It is found in 172 Illinois, and also in 40 L. R. A., page 770. This is a very well considered opinion. Here the question was amending an apportionment by adding one county. The court used this language:

The question thus raised is whether the election for senators and representatives, to be held in November, 1898, is to be held in the districts as created by the law approved June 15, 1893, and in force July 1, 1893; or in the districts as fixed by said mandatory act approved January 11, 1898, and which, if valid, will go into effect July 1, 1898.

You see this is quite an identical case with the one here under consideration.

The court further says:

The presumption is that it was for the purpose of a better adjustment of rights of representation that Dupage County was added, and that the mandatory act was passed with a view to making the legislative branch of the Government more nearly representative of the people in their sovereign capacity.

Even if made, if you please, for a greater equality of population or for more compactness of territory or for a greater contiguity of territory, the court says we can not consider that; it is not a question of policy, it is a question of power. The court goes on to say:

This, however, can not influence the determination of the case if there was a want of power to make the change, for it has always been held, as it was in People ex rel. Woodyatt *v.* Thompson (155 Ill., 451), that a court can not declare a statute uncon-

stitutional and void on the ground of unjust differences not prohibited by the statute, and within the legislative discretion; and neither can a court sustain a law, where there is a want of power to enact, merely because it is wise in policy or just in its provisions.

I have read the provision. I have stated to the committee that this particular act considered by the court was in the form of an amendment to a former apportionment act, if that be, as suggested in Mr. Saunders's brief, one of the questions to be considered; yet, if you will look at the two Virginia acts, you will see one is as complete as the other. One makes an amendment, it is true, but it redistricts the whole State throughout. But I don't think that is of moment at all. It is not a question of how greatly the power is exercised; it is a question of whether it is exercised at all.

The CHAIRMAN. What is that Illinois case?

Mr. MONTAGUE. The case of Mooney *v.* Hutchinson. That was the case of a mandamus to compel the holding of an election under one act, alleging the second act unconstitutional.

The CHAIRMAN. Is that the only Illinois case you have?

Mr. MONTAGUE. Yes; it is the only one I have. I can not now recall any others. There are some stated in this opinion. Now, I wish to read from the opinion:

The passage of an apportionment act is the exercise of a legislative power—

I will not take up the time of the committee to cite all the authorities that are given—

and if there were no other provisions relating to apportionment than the general legislative authority conferred by section 1, the legislature might apportion the State at its pleasure at any time. There is no express denial in the constitution of the right to exercise this power whenever the legislature may see fit, and it is therefore argued for the defendant that it may be exercised at any time, and that the legislature may make an apportionment whenever they choose.

That is the precise contention here which I am trying to combat.

The CHAIRMAN. That is the contention in the New Hampshire case, is it not?

Mr. MONTAGUE. Yes, sir; argumentatively, it is.

I will read further from this opinion:

This does not follow, however, and it is not essential in order that the constitution may operate as a prohibition, that it shall contain a specific provision that apportionments shall not be made otherwise than according to its provisions. The general principles governing the construction of constitutions are the same as those that apply to statutes.

He then cites authorities and continues:

The use of enactive words would be conclusive of an intent to impose a limitation, and they are used in some instances in the Constitution; but their absence is not conclusive of the opposite. Where there are provisions inserted by the people as to the time when a power shall be exercised, there is at least a strong presumption that they designed it should be exercised at that time and in the designated mode only; and such provisions must be regarded as limitations upon the power. (Citing Cooley on Constitutional Limitations, 6th ed., 94.)

If legislative power is given in general terms and is not regulated, it may be exercised in any manner chosen by the legislature; but where the Constitution fixes the time and mode of exercising a particular power it contains a necessary implication against anything contrary to it, and by stating a particular time for its exercise it also states a boundary to the legislative power. If a power is given and the mode of its exercise is prescribed, all other modes are excluded.

He then cites Sedgwick on Statutory and Constitutional Law, 31:

The legislature must keep within the legislative powers granted to it and observe the directions of the Constitution.

Now I read this:

It is here admitted, as it necessarily must be, that the provisions for apportionment are all exclusive, except the particular one as to time.

I think this must be conceded here, for it is inevitably the conclusion that must be reached:

It is not denied that the basis for apportionment must be the population of the State as ascertained by the last federal census; that the population can only be divided by the number 51; and that the quotient must be the ratio of representation in the Senate. The only claim is that the provision as to time is not exclusive, and we can not see any substantial ground which established a different rule respecting the time than a mode of doing the act.

Now, I desire to make one comment here, which, I can almost say, if the committee forgets everything else I beg them to remember it; that the whole contention here that there must be negative words, express words of exclusion, in the Constitution, is giving a forced construction. I contend when you give the time and the mode the exercise is limited, and the power can be repeated by affirmative words only. That is my contention. It is not the absence of exclusive or negative words restraining apportionments, but to carry the power for plural apportionments there must be affirmative words authorizing the renewal of the apportionment, and I think this decision justifies me in submitting that as the proper construction of constitutions dealing with such apportionments as we are now considering. Absence of affirmative authorization necessarily forbids second or plural apportionments. [Reading further from the same opinion, above referred to:]

In Wisconsin the constitution provided for an apportionment and organization of assembly districts once in five years, but contained no express prohibition against their alteration between the periods fixed for apportionment, and in Slauson *v.* Racine (13 Wis., 398) it was said that "whatever limitation existed upon the power of the legislature in that respect was to be derived from the general scope and object of the provisions of the constitution concerning the apportionment of Senators and Representatives, but that it might well be said that this furnished such limitation;" and it was held that the provision implied that apportionments should not be made at any other time than that fixed by the constitution. The constitution of Indiana fixes the time once in six years when an enumeration of the voters of the State shall be taken, and the apportionment shall be made by law.

Citing the case of Denny *v.* State (144 Ind., 503), the opinion says:

This question was determined against the claim made, and it was held that if there were no particular provisions in regard to the subject of legislative apportionment, the legislature might, under a full and unrestricted vesting of legislative power, enact apportionment laws at their pleasure, but that the fixing by the constitution of a time and mode for the doing of such act was, by necessary implication, a forbidding of any other time or mode and a prohibition of the exercise of the power in any other way.

The eminent counsel who have argued this case for the defendant with great learning and ability have failed to find any decisions contrary to the foregoing, or any authorities conflicting with those given, but insist that there is a difference between the constitution of Indiana and this State which makes the decision in Denny *v.* State (144 Ind.) inapplicable here. The distinction attempted to be shown we are compelled to regard as unsubstantial, and can not consider it a ground of difference that the enumeration which was made the basis of the apportionment in Indiana is taken once in six years, while the census, which is made a like basis in this State, is taken by the United States, and once in ten years.

I will read further from the same case:

The apportionment, after the First Census, was not made to depend upon any subsequent enumeration or event, and after the first enumeration the legislature not only apportioned the State every five years, but made changes during intervals.

What has been the legislative interpretation, long established and acquiesced in in this country, as to enumerations in the United States? Are they ever made at any other time but once in ten years? Now, I will read the conclusion of this case. [Reading further from the case of Mooney *v.* Hutchinson:]

When the legislature of 1893 made the apportionment of that year, the conditions existed which authorized the exercise of the power and the legislative discretion was exercised, based upon the federal census of 1890—a division of the population by fifty-one and the resulting quotient as the ratio of representation. That power and discretion, when fully exercised, were exhausted and the power will not again arise until the conditions provided for in the Constitution shall again exist. The power and discretion are to be exercised at stated intervals and in certain modes, and that legislature, upon consideration of the facts, exercised the power and the discretion. A subsequent reapportionment based upon the same census, the same division, and the same quotient, which it is admitted must be used, would be nothing but reversing the judgment and discretion of that legislature, exercised upon the same facts at the time expressly authorized by the Constitution; and we can not think that it was in the contemplation of those who adopted the Constitution, that succeeding legislatures should set aside the conclusion of the first by changing and remodeling districts, where no new condition contemplated by the Constitution exists.

As I said at the outset, if this were a case of first impression here, I don't think there could be any doubt as to the invalidity of the second apportionment, that it was an excess of power and was unconstitutional. And I submit, I repeat, that the case of fifty years ago, made in the heat of party stress, should not be taken in this day of good will throughout the length and breadth of the country, to overrule the juridical judgments of the United States, I may add, the settled law of the land, wherever the question has been squarely passed upon by judges, considering the case before them as judges, and applying the law of the land to the case.

The CHAIRMAN. The courts seem to be partisan still, however.

Mr. MONTAGUE. But you will find that in this case they went against their own partisan convictions and decided on the other side.

The CHAIRMAN. What was the Indiana case?

Mr. MONTAGUE. There is a dissenting opinion in that case I have just referred to. The case in Indiana is the case of Denney *v.* The State.

The CHAIRMAN. Have you referred to the case of Parker *v.* State of Indiana?

Mr. MONTAGUE. I have not. It is referred to in those cases, but I do not think that takes up the question. That case deals with the inequality of population rather than the exhaustion of power.

The CHAIRMAN. My reason for asking is that that is one of the cases cited by the contestee in this case, on which he relies.

Mr. MONTAGUE. When you read that case, you will find it is not a precedent. I think there are some other cases——

Mr. SAUNDERS. What case is that?

The CHAIRMAN. The case of Parker *v.* State of Indiana, that you refer to on page 13.

Mr. MONTAGUE. In the case of Cunningham *v.* Secretary of State (81 Wis.)——

The CHAIRMAN. I might say that the case of Parker *v.* the State is one of the cases on which you folks have been relying.

Mr. MONTAGUE. It sustains our view in its general argumentative character, but I don't think the question sufficiently similar to make it identical with the case I am now arguing.

In this case, the State *v.* Cunningham——

The CHAIRMAN. Is that the Wisconsin case?

Mr. MONTAGUE. Yes, sir. I submit that few cases have been argued with more ability than this Mr. Bragg, Mr. Estabrook, and Senator Spooner argued the case, and the argument is given at great length in the report of the case. There, however, the chief question involved was the inequality of population, discrepancy in the apportionment of population. There is a case in Ohio, the case of Evans *v.* Dudley (First Ohio, p. 437), where this question of a second apportionment was involved, and supports, as far as it goes, the construction which I am submitting as to exhaustion of power.

Mr. TOU VELLE. Is there not a later decision in Ohio than that?

Mr. MONTAGUE. I am not prepared to say. This may be a little desultory, but my eye falls upon this particular clause. It relates more to the disparity of population than it does to the exhaustion of power; but the court says there that the right to pass upon the constitutionality of the apportionment act is a purely judicial one; that the passage of such an act is the exercise of a legislative and not a political power, and goes on to give a number of decisions sustaining that, and then uses this language:

The only three cases in which it is even intimated that the court has not jurisdiction in such a case are the opinions of the justices, in 142 Mass., 601; 10 Gray, 613; and Wise *v.* Bigger, 79 Va., 232.

The CHAIRMAN. What are you reading from?

Mr. MONTAGUE. I am reading from the case of State ex rel Attorney-General *v.* Cunningham (81 Wisc., 480):

There was no argument of the question in these cases, and in the last—

That is the Wise *v.* Bigger case—

the question was not in the case at all.

Mr. NELSON. That is the Virginia case?

Mr. MONTAGUE. Yes. And I stop to say that that question was passed over sub silencio in the Virginia case, and it can not be considered in any sense a precedent.

Mr. NELSON. Is that case you put in there the case of Cunningham *v.* State?

Mr. MONTAGUE. Yes. I say this may possibly be called a dictum, but the same case says, at page 517:

The duty to pass such an act is a continuing one from the time it is constitutionally devolved upon the legislature until performed.

The CHAIRMAN. This is the Virginia case?

Mr. MONTAGUE. No; the Cunningham case.

From the time it is constitutionally devolved upon the legislature until performed, though when thus performed the power to pass any other such act is exhausted and will not again arise until after another enumeration.

There were three or four opinions in this case, I think three, if I recall, and a unanimous conclusion—all very strong.

On this question, if it please the committee, I submit that the report of a political body, no matter how honorable and dignified it may be, over fifty years ago, should not be considered as against opinions without conflict upon the same subject by judicial bodies, passing upon constitutions similar in almost every respect to the Constitution of the United States. Again, that the United States

statute of apportionment at that time is not at all like the act of apportionment in operation now; and that the whole facts surrounding this case, so far as the act of apportionment is concerned take it out of the ruling in Perkins *v.* Morrison, and brings it under the ruling of the cases which I have just named, which I confidently assert is the law of the land.

There is a West Virginia case to which I want to call to the attention of the committee. I had it a moment ago, but I do not find it at this moment. In that case, there was express language of limitation. Therefore, I have not cited it as being pertinent.

The CHAIRMAN. Have you cited the West Virginia case?

Mr. MONTAGUE. I do not find that case at this moment.

The CHAIRMAN. Is that a late case?

Mr. MONTAGUE. It is rather a late case. The only feature of the case that is worthy of consideration is that in arguendo it approves of the Illinois case and the Indiana case. But the constitutions are different, in that there is an express denial of the power to reapportion. It not only says you should do it, but that you should not do it at any other time. In other words, the West Virginia constitution there was commanding in terms what the decisions had decided in Illinois, Indiana, and Wisconsin was the law without such terms. (Harmison *v.* Commissioners (W. Va.), 42 L. R. A., 591.)

Mr. BENNET. Are you familiar with the cases in the State of New York?

Mr. MONTAGUE. I thank you for calling my attention to the matter. I will cite the New York case on this point before I leave it, the case of Baird *v.* Supervisors (138 N. Y., 106), where the opinion was delivered by the late Mr. Justice Peckham, then of the court of appeals of the State of New York, I believe. The court of appeals is your highest appellate court in New York?

Mr. BENNET. Yes.

Mr. MONTAGUE. There are so many of those courts that I sometimes get them confused.

I cite that case on the particular point, where the judge deals with very great force with the subject of necessary implication. There, for instance, the State in one constitution, of 1846, said the districts should be apportioned to the population equally divided, and in the constitution following it the subject of the equality of population was omitted altogether; but it says that the State should be apportioned, and Mr. Justice Peckham said the conclusion and the whole history of the State of New York unquestionably meant that the population of these legislative districts ought to be measurably in keeping with equality, district to district. Now, therefore, I will leave that particular phase of the case and address myself to one other.

Mr. BENNET. Before you leave that, it may interest you to know that there is a very recent case in New York, decided within the last two or three years, and I would be interested in having your view of this state of facts. We redistricted the State. We had an enumeration, to adopt your method of thought for a moment, in 1905 and a redistricting in 1906. Some gentlemen contended that the redistricting was not in accordance with the constitution of 1894, our latest constitution. They took the case to our court of appeals and the

court of appeals sustained their contention and set the redistricting aside—set the apportionment aside.

Mr. MONTAGUE. On what ground?

Mr. BENNET. On the ground of inequality, a violation of the constitutional provisions as to contiguous territory.

Mr. MONTAGUE. Not on the ground of exhaustion of power by reason of a second apportionment under the same enumeration?

Mr. BENNET. No; but the point I wish to get your opinion on was this. They specifically directed a second apportionment, which was had and under which we are now acting.

Mr. MONTAGUE. I am not familiar with that case.

Mr. NELSON. They directed a second apportionment after the first had been declared unconstitutional?

Mr. BENNET. Yes.

Mr. MONTAGUE. The legislature rejected it?

Mr. BENNET. The court held that the first apportionment was not an apportionment at all.

Mr. MONTAGUE. But they held that the constitutional mandate was continuing and another apportionment must be made under this command?

Mr. BENNET. Yes.

Mr. MONTAGUE. That I think entirely correct. It is a continuing power until exercised, and that particular exercise was an abortive attempt to exercise the power.

Mr. BENNET. So they held.

Mr. MONTAGUE. I imagined that would be it.

I want to read from Cooley on Constitutional Limitations. [Reading:]

> If the directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least strong presumption that the people designed it should be exercised in that time and mode only.

That is page 115. I read that before, I think. But here is what I wanted. This is in the 7th edition, prepared with great care by Professor Lane, of the University of Michigan, who has not undertaken to change the text, but to accompany it by cases and annotations. There is this footnote:

> Where the constitution provides that the legislature shall apportion the State into legislature districts, every ten years and that such appointments—

He means apportionments—

> shall be based on the last preceding federal census, one exercise of this power of apportionment exhausts it, and the State can not be reapportioned until after the next federal census.

He then cites the Illinois case to which I have referred.

If it please the committee, I have not gotten along as fast as I had hoped, but I want to address myself for a moment to what I consider the invalidity of this apportionment act of 1908, on the ground that it does not preserve the equality of population or compactness or contiguity of territory.

As I have suggested in my opening, it seems to me that this particular power primarily must rest in the National Government, in order that it might meet any exigencies that might arise as a means of self-preservation. It has only in a measure been taken over by the National Government, though the National Government possesses the

power now to deal with this case. That leads me here to make one suggestion, and that is as to the mode, the times, and places of holding elections. In what was known as the "force bill," which was enacted by the National Government, the constitutional question of apportionments was not touched in the act. That did not go to the question of apportionment or enumeration, the act went to the question of holding elections, distinct subjects.

Mr. BENNET. The manner of holding them?

Mr. MONTAGUE. Yes. The idea of any sane man saying that the holding of an election is the making of an apportionment or the making of a district is to me inconceivable. Of course, I say that respectfully.

Mr. BENNET. Before you start in on the other branch of the argument, do you desire to say anything about the case of Carter *v.* Rice, in New York?

Mr. MONTAGUE. I don't want to weary the committee. That is cited in the Baird case and cited also in the Indiana case, if I recollect correctly. I am sure it is cited in the Illinois case.

The CHAIRMAN. It is superseded by a later decision of the New York court, as I understand it?

Mr. BENNET. Yes.

Mr. NELSON. Do you remember the decision?

Mr. SAUNDERS. There is a later case, but it does not supersede it at all.

Mr. NELSON. Carter *v.* Rice arose under the constitution of 1846 in our State, and it was a rather bitterly contested case and involved the redistricting of our State into senate districts. The decision in that case, as I recall it, was that under the constitution of 1846 there was a certain discretion in the legislature, and although the districts might not be entirely contiguous districts, entirely compact districts, and entirely equal as to population, that the legislature having exercised its discretion, carved out the districts, the court of appeals would not interfere, and they did not interfere, and it is in a subsequent case that they did interfere and under the constitution of 1894 upset the apportionment.

Mr. NELSON. On the ground of inequality of population or lack of contiguity in territory, which?

Mr. BENNET. The latest decision was on the ground of inequality of population and contiguity of territory and compactness of districts—all three.

Mr. SAUNDERS. I do not understand that these gentlemen claim that that later case reverses Carter *v.* Rice.

Mr. MONTAGUE. I simply say that on the subject of inequality of apportionment and compactness of territory each case must stand upon its own merits. The courts' decisions all sustain or support the right to declare such acts invalid, and you can get from these decisions the general principles which should apply; but whether in any given instance the district lacks compactness or lacks contiguity, or lacks equality of population, must in the last analysis be determined by the particular case.

Mr. BENNET. But you do contend, as I understand it, that the jurisdiction is in the courts of a State to determine whether a legislative act is under a constitution requiring equality of population and contiguity and compactness of territory; that the legislature

must comply with that and that the court has a right to say whether they have complied with that.

Mr. MONTAGUE. I do; yes. I say the courts will be careful but have full power to do it. That is very well put, Mr. Bennet.

As I stated, I don't know but three cases that hold that a court can not do that, and I have cited those.

I think counsel concedes this in his brief. I think Mr. Saunders puts it rather strongly. It is a question sometimes of the chancellor's foot. It must be determined by the court's sense of intellectual and ethical appreciation of the rightfulness and wrongfulness of things.

One of the three cases referred to is the case tried in my own State, of Wise *v.* Bigger. This was known as the readjuster court in Virginia. The president of the court was Judge Lewis, a very excellent man, a Republican. The judge who delivered this opinion was Judge Fauntelroy, a very excellent gentleman. In that case there was a mandamus to compel the keeper of the rolls—we call our clerk of the house of delegates the keeper of the rolls—to strike from the rolls, and the superintendent of public printing to omit from the acts of assembly, the particular act of apportionment there involved. (Page 269 and beginning at page 282 of the opinion.)

Nearly the whole of the opinion is taken up with a discussion of jurisdiction to entertain mandamus in such a case, the verity of the journals of the legislature, and that the keeper of the rolls had no authority to strike out the act, and that the public printer was functus officio after having printed it to recall it and you could not compel him by a mandamus to do so. The whole case was mainly taken up with this discussion, and concludes in this way:

> But the laying off and defining of the congressional districts is the exercise of the political and discretionary power of the legislature, for which they are amenable to the people whose representatives they are.

That is one of the three cases which I have submitted as denying the jurisdiction of the courts to declare invalid apportionment acts. There is not a thing in this case other than the quotation just made which touches the case here, and this opinion is generally commented upon unfavorably wherever cited.

I have tried to show, first, that a court has ample power to annul an act of the legislature on the ground of inequality of population, lack of compactness or lack of contiguity in the districts. I think it will be conceded that such an act can be declared null and void.

Now, can this be? Is there anything in this act that justifies its invalidity?

The constitution of Virginia follows the Constitution and the statute of the United States. So this committee, if my contention is sound, need not invoke the Constitution of the United States to intervene to overthrow the statute of Virginia. It can overthrow the statute to save equality of the population and compactness and contiguity of territory under the constitution of Virginia. This is section 55 of the Virginia constitution:

> The general assembly shall by law apportion the State into districts corresponding with the number of representatives to which it may be entitled in the House of Representatives of the Congress of the United States; which districts shall be composed of contiguous and compact territory containing, as nearly as practicable, an equal number of inhabitants.

I am frank to confess that the courts give quite a good deal of latitude to the legislature in the exercise of that mandate.

What do you mean by compact territory? What do you mean by as nearly the same population as may be? Now, take this district, the Fifth district. It had 175,000 population, in round numbers. This act takes from it 15,000 population in the county of Floyd. The unit would be the quotient of 1,800,000, divided by 10, the number of Representatives allotted to the State of Virginia, which, in round numbers, would put the unit at 180,000 for each district.

Mr. NELSON. May I interrupt for information?

Mr. MONTAGUE. Certainly.

Mr. NELSON. What was the unit of population in the State which the governor vetoed—which yourself, as governor, vetoed?

Mr. MONTAGUE. I can not remember it all; I can not remember it, but it was substantially about this.

Mr. BENNET. I don't think you understood the question. He asked what was the unit.

Mr. MONTAGUE. One hundred and eighty thousand under the present census.

Mr. BENNET. Both were based on the last census?

Mr. MONTAGUE. Yes. You see, we never made any apportionment. An apportionment was attempted in 1902 and it failed.

Mr. SAUNDERS. In 1902.

Mr. MONTAGUE. Then in 1906 an apportionment was made, and in 1908 another apportionment was made; two being made, you see, under the same census, and it is this second apportionment that I argue as ultra vires because the power of apportionment had been exhausted by the act of 1906.

The Fifth district now contains 160,000, about 20,000 less than the unit of population. The Sixth district contains 187,000 population, 7,000 more than the unit of population. Now, what was done? Floyd County was taken from the district that was below the unit and added to a district that was above the unit of population. In other words, the 187,000 population was increased to 202,000, and the 175,000 population of the Fifth district was decreased to 160,000. Now, how can you explain that you are complying with the constitution of Virginia, with the Constitution of the United States, that each district shall be as nearly equal as practicable in the matter of population, contiguity, and compactness of territory?

The CHAIRMAN. We are going to let Judge Saunders show that.

Mr. NELSON. Was there any community of interests involved?

Mr. MONTAGUE. I think not. But even if there were, can a community of interest override what are the express requirements of the Constitution of the United States and of the State in respect to equality of population, contiguity, and compactness of territory? Those are the three factors, as I understand it, to determine—not community of interest. I can well appreciate that sometimes to get compactness of territory you may fall back in equality of population, and vice versa; I appreciate that; but there can be no argument, I submit, that in this case before us the inequality in population was exchanged for greater compactness of territory, or that less contiguity was exchanged for greater equality of population. The map of the district has been shown. I do not know anything of the proof in this case. I understand that it was charged in the notice that the taking

of Floyd County rendered this district practically not contiguous, because when you reach the contiguous point in Patrick and Carroll counties you can not pass from one into the other unless you depart from the district because of an intervening mountain barrier.

The CHAIRMAN. Communication through Floyd County?

Mr. MONTAGUE. You must go through Floyd County, or on the south, through North Carolina. I am told that there are witnesses who testified to that state of physical facts, and that those witnesses are not contradicted. If that be true, then the fact must be conceded that you can not get from Patrick into Carroll by the ordinary method of communication. That is a mountainous country. I presume that fact has appeared here. There is a range of mountains running across, and the only way of communication are the common public roads through what are known as the gaps, north or south as the case may be, and there are no roads through Patrick directly into Carroll. I am told that the evidence sustains that. If so, I submit that that demonstrates the lack of that contiguity which the statute requires and which the Constitution of the United States and of Virginia require. It renders it also uncompact, because it does not make any difference if they do touch physically if at the point of contact the physical obstructions are of such character that the intercommunication is interrupted; I submit that if that physical fact stands out then the contiguity is broken and the compactness is broken.

May I read a word or two from the Wisconsin case and the New York case may be cited as sustaining it.

Says the court in this case:

> And here it is fit to observe that perversion of the constitutional rules of apportionment designed to secure a fair and just representation, manifestly tend to and, if unrestrained, may in time work a destruction and overthrow of the system of popular representative government itself. It is to no purpose to say that if the power of representation by a wrongful and illegal apportionment has been put in the hands of the minority, whereby they are able to perpetuate their ascendency and power, there is, as was contended in argument, an adequate and appropriate remedy for such wrongs at the ballot box. The case of Attorney-General *v.* Eau Claire (37 Wis., 400), adjudicated after elaborate argument and the fullest consideration, is directly in point. The rights advocated and protected from the prejudicial effect of an unconstitutional act of the legislature, the assertion of which it was sought to restrain in that case, were not rights of property or proprietary rights in any proper sense; but were rights of sovereignty which the State, in its own political capacity, held and was bound to guard and protect—rights not other or different in point of law from the rights of the people to have full effect given to the political power of each elector and a fair and constitutional apportionment of the representative legislative bodies.

I understand that the equality of population is intended in order that a people may not be over represented or under represented. In other words, districts shall have about the same population, that each may have the same representative power in legislative councils; and that it is one of the aims of our Government that one group shall not be so large that thereby it would be unrepresented, or so few, that thereby it would be over represented; but that you should bring, in order to preserve the numerical power, which finds its voice in the House, into districts of about the same population.

Mr. KORBLY. It is not your contention that the district is the unit of representation? These gentlemen represent Virginia. Mr. Saunders represents all the people of Virginia, does he not?

Mr. MONTAGUE. That is an argument which is made with a deal of force, but I have suggested—although I may be mistaken—that I

can not conceive how you can hold this a national question, and it is national under the powers of the Constitution, for the very purpose of national self-preservation and then subordinate it to the unrestrained powers of the State; for the people of the State rather than the political entity known as the State are represented in national, rather than in their state, power in the House of Representatives.

Mr. BENNET. Does not the fact that the Constitution of the United States in one of its sections provides for the election of President, in case there is no election by the electors, by the House of Representatives, in which case each State gives one vote, and that one vote being determined by the majority of Representatives from that State, rather compel an equality of representation in the State?

Mr. MONTAGUE. Yes, but only as to this extraordinary method of election; and then, Mr. Bennet, that was the subject of the compromise in the convention of 1787, to give the people representation in the House and the State representation in the Senate. That was the great question that came near breaking the convention up two or three times.

The CHAIRMAN. What would you say as to the inequality of apportionment in my own State? For instance, the third district has over 284,000 population, and my own district has only 157,000, or a difference of 126,000.

Mr. MONTAGUE. What would be the unit?

The CHAIRMAN. The unit was about 180,000.

Mr. MONTAGUE. In your State?

The CHAIRMAN. Yes, as I recall it.

Mr. MONTAGUE. How many Representatives have you?

Mr. NELSON. Did it exhaust its power at the time of the first apportionment——

Mr. MONTAGUE. You mean that is the present condition?

The CHAIRMAN. The present condition.

Mr. MONTAGUE. I would answer then, Judge, because I can not embarrass the march of my argument to its legitimate conclusion, I would answer that unless there were some very special reasons why you could not have greater equality of population, that that discrepancy constitutes an unconstitutional apportionment.

Mr. SAUNDERS. In the State of New York there are districts which exhibit a greater difference in population than that; for instance, one district has over 400,000 and another only 154,000.

Mr. MONTAGUE. Now, you bring me to questions that I may be treading on people's toes to discuss; but if you will permit me to express my own candid view, I will say the whole thing is wrong, and that Virginia is as interested in an equal apportionment in Kansas, and Kansas equally is interested in an equal apportionment in Virginia. This is the one point and power in which we touch hands in a national sense throughout the length and breadth of the Republic; and I do not know of any better time that we may set a precedent of real force and character. President Harrison, you remember, delivered a message in which he said that gerrymandering, or the inequalities of representation, was one of the dangers of the Republic.

Mr. NELSON. I would like you to give us what you think is our power to declare unconstitutional a state law.

Mr. MONTAGUE. I think you have the same power that the court has. In fact, Mr. Saunders concedes that; and, indeed, I think you

have more power. I do not say more power, but you are a political body supervising another political body, acting in this matter as the agent of the National Government, and therefore you are not trenching upon the several departments of the Government; you are simply confining the agent, the State, within its constitutional limitations.

The CHAIRMAN. It is conceded we have the power.

Mr. MONATGUE. I submit, in conclusion, that the discrepancy of population here is not justified; that its reduction was in a case where there should have been an addition rather than a reduction; and that the compactness of the territory was lessened when there was no necessity for lessening it; and both as respects numbers and territory the inequality or disproportion are unconstitutionally exaggerated by this bill. There seems to be no possible reason to justify, in a constitutional sense, any such discrepancy.

Mr. HOWELL. If this apportionment had been made in the first instance by the legislature of Virginia, would you deem it such an apportionment as ought to be attacked on account of its inequality of population and lack of compactness?

Mr. MONTAGUE. My answer to that is that when that question was presented to me under my official oath, I vetoed it on the ground of its unconstitutionality.

Now, one other question. It is manifest in this particular case that if the present apportionment is invalid you go back to a better condition so far as compactness and population are concerned, than obtains under the apportionment act of 1908, should this act be declared invalid.

Mr. NELSON. Have we, sitting as a court here, to take into consideration consequences, very much?

Mr. MONTAGUE. The courts have done that. I don't know that you would have to do it; certainly not as to the question of exhaustion of power. That would not apply at all. I have read a decision on that.

Here is the Ninth District, with 220,000 people. Mr. Saunders can correct me if I am wrong. Those are the present figures after the change has been made. This includes Craig County?

Mr. SAUNDERS. Yes.

Mr. MONTAGUE. How much population has Craig County?

Mr. SAUNDERS. It is a small county—perhaps ten or eleven thousand——

A MEMBER. About 6,000.

Mr. MONTAGUE. The Ninth District, then, was about 218,000, but yet in this apportionment of 1908 they added Craig County to that district.

Mr. SAUNDERS. Oh, no; they took it away.

Mr. MONTAGUE. I mean they took it from the district, which only cuts it down 6,000 from 218,000. That is the only case where there is any tendency to better the apportionment—the subtraction of Craig County from the Ninth District. The Tenth District has 190,492, inclusive of Craig. So you see there was no necessity, so far as population was concerned, to add Craig to the Tenth District.

I will not pursue this further, save to say that in the first place this contiguity from the map is a matter of visual proof, supplemented, of course, by proof as to communication, so that contiguity may be easily determined.

Mr. BENNET. Would the legislature of 1902, under your constitution, have power to pass that apportionment act over your veto?

Mr. MONTAGUE. Oh, yes; but there was not a move made to do it. The legislature seemed to recognize the constitutional prescriptions which were suggested.

Mr. BENNET. I assume that there was enough of one party in either branch to have had from that party the necessary two-thirds, or whatever was necessary.

Mr. MONTAGUE. Your assumption is not a violent one at all.

Mr. NELSON. If you recollect, how did the conditions in the fifth and sixth districts then compare with what they are now?

Mr. MONTAGUE. The sixth district was above the unit then, and yet an addition is made by the last apportionment.

Mr. NELSON. I mean did the fifth and sixth districts have the same lack of contiguity and compactness in population in the apportionment that you vetoed?

Mr. MONTAGUE. Perhaps conditions in some of the districts were more accentuated; others were not so much so. The fifth district we are now considering was not as unequal under the vetoed apportionment as under present apportionment. But I have not gone over that for some little time, and I do not pretend to be accurate in my recollection.

The CHAIRMAN. Have the courts of your State ever passed upon the questions with reference to redistricting the State?

Mr. MONTAGUE. No, sir.

The CHAIRMAN. It has not been before any district court of the State?

Mr. MONTAGUE. Not that I know of. You mean the legislative or senatorial apportionment?

The CHAIRMAN. Yes.

Mr. MONTAGUE. I can not recall any.

The CHAIRMAN. I mean in the districts of your State.

Mr. MONTAGUE. You mean the United States district courts?

The CHAIRMAN. No.

Mr. MONTAGUE. You mean our state courts?

The CHAIRMAN. Yes; as to whether in the election of state senators or members of the legislature any such question has come up.

Mr. MONTAGUE. I can recall none. No; I do not remember any; I am quite sure that there has not been any in the history of the State.

The CHAIRMAN. If we are to believe what is said by some of the leading Democratic papers in Virginia, that a great outrage is perpetrated by the legislature of your State in reapportioning your State as they have, why have not some of them gone into the courts and brought up the question of state apportionment under the constitution, as to whether or not this legislation was constitutional—whether this act was constitutional?

Mr. MONTAGUE. This is an apportionment purely of the congressional districts.

The CHAIRMAN. I understand; but could not this case have been determined in your state courts?

Mr. MONTAGUE. I think so.

The CHAIRMAN. Why has it not been?

Mr. MONTAGUE. I could not answer that.

The CHAIRMAN. It would have been a very proper thing for either of these parties to have gone into the state courts?

Mr. MONTAGUE. I think so, on a mandamus or injunction; it would have brought the matter up, and then it could have been appealed to the Supreme Court of the United States if necessary, I think. But that is a pretty long procedure, and the question has been submitted now and the jurisdiction and power of this committee are conceded. It can do what the courts can do. I ask it to apply the law the courts would apply.

(Thereupon, at 5 o'clock p. m., the committee adjourned until to-morrow, March 3, 1910, at 10 o'clock a. m.)

COMMITTEE ON ELECTIONS, No. 2,
HOUSE OF REPRESENTATIVES,
Thursday, March 3, 1910.

The committee met at 10.25 o'clock a. m., Hon. James M. Miller (chairman), presiding.

The CHAIRMAN. Senator Thurston, have you anything more to say in favor of the contestant?

Mr. THURSTON. No, Mr. Chairman, we have finished our opening.

The CHAIRMAN. Then we will hear Judge Saunders.

STATEMENT OF HON. EDWARD W. SAUNDERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA.

Mr. SAUNDERS. Mr. Chairman and gentlemen of the committee, I am glad to be able to come to a definite issue over this matter, and to find out what are the present contentions on the part of this contestant, upon which he bases his claim to a seat in the Congress of the United States. I might cite a famous saying, and exclaim: "Oh, what a fall is here, my countrymen," having reference to the extent to which this case has shrunk since the first statements about it were given out to the newspapers, and since the contestant first put his claims into formal shape in his notice of contest. That notice abounded in charges of fraud, of irregularity, of conspiracy, of wrongdoing, of injustice. It concluded with a statement that the irregularities in this case were such that, on investigation by the committee, it would find amply sufficient grounds upon which to seat the contestant. Taking up these charges of fraud and conspiracy, it will be noted that they have vanished. There is not a shred of testimony to support them, and they are not even insisted upon by counsel.

There is gone forever from this case the charge that, with respect to the candidacy of Mathew, there was a conspiracy on the part of the contestee, and of the election officials, and of the Democratic party in the State of Virginia, to induce him to become a candidate; gone for the simple reason that the evidence in this case shows that no such conspiracy ever existed. The Democratic party was at no time a party to any scheme by which this man was to become a candidate, nor did it seek to preserve his candidacy as a secret from all the voters, save the Democratic voters. The evidence on this question shows that it was the Democratic newspapers in this district that spread far and wide the fact that this man was a candidate. So far from his candidacy being a secret, it was known all over the district, to everyone who kept track of the news items in the papers. The evidence in this case shows that the Lynchburg

News, the editor of which is Mr. Glass, my colleague in this House, one of the most strenuous, and if you choose to call him so, most partisan Democrats in the State of Virginia, published two weeks before the election the fact that there would be three candidates in the Fifth District of Virginia, naming Mathews as one of the three. This paper has an extensive circulation in every county in the fifth and sixth districts. (See Record, p. 380.)

The evidence further shows that in the county of Henry another supporter of mine who, I suppose, attacked Mr. Parsons more vigorously than any other editor in the district, or in Virginia, in the issue of his paper that came out the week before the election, called attention to the fact that Mathew would be on the ticket, and cautioned the voters with respect to marking their ballots. This editorial is an exhibit. (See Record, p. 265.)

It is further shown that, so far as Mathew's candidacy was concerned, instead of the same being a secret it was spread abroad in the district for weeks before he sent his notice to the secretary of the Commonwealth. He sent his postal cards broadcast. One of them was received in the county of the contestant by the clerk of the court there, Mr. Bryant, one of the leading men of the Republican machine in that county. (Record, p. 325.) Another was received in the eastern end of the district by the Democratic mayor of Chatham. (Record, p. 415.) Further, the fact that he was a candidate was posted on the door of the court-house in the county of Henry. (Record, p. 266.) A friend and political supporter of mine, on the electoral board of Franklin County, wrote to the secretary of the Commonwealth that Mathew had announced throughout the district the fact that he was a candidate for Congress. So much for the charge that there was a conspiracy to preserve the secret of Mathew's candidacy. It was spread broadcast from one end of the district to the other. Hence I say that this charge of conspiracy in respect to this man's candidacy has vanished into thin air.

The CHAIRMAN. Are any of the clippings from any of these papers in the record?

Mr. SAUNDERS. The proof is in the record, and I have cited the committee to the appropriate pages of the record where the same may be found.

I will say further, gone forever out of this case is the charge that we were interested in keeping this man Mathew upon the ballot, for the evidence shows that the only effort that was made to keep Mathew from the ballot was made on the part of my own friends in my own county, who were the first and only persons to inform the secretary of the Commonwealth that he was of a disordered mind, and to suggest that he ought not to be on the ballot.

There was taken in this case a significant piece of testimony, made more significant by reason of the fact that the man who gave it little knew how prejudicial his statement would be to the cause of his friend, Mr. Parsons. The testimony of a man named Roller was taken in the county of Rockingham, in the State of Virginia. Contestant endeavored to show by him the fact that Mathew was a candidate in secret, and that the Democratic organization had kept the knowledge of the same from the people of the Fifth District of Virginia. They asked him in the course of his testimony, this question: "Who would know about the fact that Mathew was a candidate?"

In his answer he went on to state that the members of the electoral boards of the counties would be the only people who would know that fact, and then he added: "As a matter of fact, there would be only one electoral board in the Fifth District of Virginia who would know whether the man was a lunatic or not, and that board was the board of the county of Mathew's residence, the board of the county of the contestee, that is, the county of Franklin. These people would know that he was a lunatic as soon as his name was certified down to them by the secretary of the Commonwealth as one of the names to go on the official ballot of the Fifth District." Then the witness added, little knowing the actual situation, that if that board had been disposed to be fair, it would have called the attention of the secretary of the Commonwealth to the fact that this man was a lunatic. At this time the witness was unaware that that was precisely what had been done by the secretary of the board in the county of Franklin.

Mr. KORBLY. That he was insane?

Mr. SAUNDERS. Yes; that he was a lunatic, because they were aware of the fact. Roller suggested a course that the board, in his opinion, should have pursued all unwitting that this was exactly what had been done. I am interested in this action of the local board, not as a matter of law, but simply as a matter of good faith, because I would not have this committee entertain the idea that I would be a party to a disgraceful scheme to induce a lunatic's candidacy merely to confuse the ballot in my district, a scheme that would be unworkable under the present laws of Virginia, as I will show to this committee. The scheme would have been as futile as it would have been disgraceful on the part of the conspirators. The very moment the notice came down to the secretary of the electoral board of Franklin County that Mathews's name would be one of the three names on the ballot, the secretary of that board, who, as I have said before, was my personal friend and political supporter, sat down and wrote to the secretary of the Commonwealth to the effect that Mathews was a lunatic, a man of good education, but of disordered mind. (Record, p. 585.) In this letter Martin suggested to the secretary that Mathews's name ought not to appear on the official ballot. The secretary of the Commonwealth, mindful of his duty in the premises, replied that he had no authority under any proceedings he could institute to erase this name, and referred his correspondent to the highest law officer of the State of Virginia, the attorney-general. A correspondence then followed between Mr. Martin and the attorney-general. The letters that passed between the two are filed as exhibits. Gone forever, therefore, from this case is the suggestion that the Democratic party of the Fifth Virginia district set on foot a disgraceful scheme to further a lunatic's candidacy or to aid or abet it in any way, for the simple reason that it amply appears that the only people who were ever concerned in any movement to hinder Mathews's name from appearing on the ballot were Democratic officials in contestee's district.

Gone also is the charge made in the notice of contestant, that there was a conspiracy on the part of the Democratic organization to deprive him and his party of the right to minority representation in the election judges at the several precincts in the Fifth District of Virginia, gone for the reason that the alleged conspiracy was a figment of contestant's imagination, and gone for the further reason

that the contestant made no effort to follow up that allegation by any sort of evidence in support of the same. So far from the charge being true that contestant did not have minority representation, it is shown that at more than one precinct in the Fifth District he had a majority of the judges. At one precinct he had all of the judges and all of the clerks. At another he had all of the judges and one of the clerks. At still another he had two of the judges. (See Analysis, pp. 80, 83, 89.) There was not a precinct in the Fifth District of Virginia at which a minority judge had not been appointed in conformity with the law of that State. There are only one or two places at which any question is raised, and I will call the attention of the committee in this connection to these places. At Design, a precinct in the county of Pittsylvania, the complaint is made that the judges of election at that place would not appoint a Republican as the third judge. I wish to call the attention of the committee to the facts, as appears from the record, that a Republican had been appointed for that precinct, a man named Wright, and the evidence shows that an official ballot was abstracted while the package of ballots was in his possession. He appeared at the polls on the morning of the election and declined to act. Another man was then recommended, but he was believed by one of the judges to be in possession of the missing ballot, in fact he claims to have seen him with it. Hence the judges would not appoint this man. Under these circumstances the judges appointed a Democrat. (See Analysis, p. 26.) I assert that the Republican judge who was appointed at that place either abstracted the ballot or else permitted the abstraction, because no effort was made to refute the evidence which convicts him of the charge. I defy these gentlemen, in this connection, to refer me to any evidence in this record refuting that in defense of Mr. Wright. In this connection, I wish to say to the committee that when I assert a proposition, as a fact, I hold myself ready, in response to inquiry from any member of this committee, or the counsel representing the contestant, to support that assertion by immediate reference to the record in this case. The evidence relating to Wright is simply this: He was appointed in the first instance by the electoral board. The law of Virginia requires that the official ballots shall be put up in sealed packages and sent to the judges at the precincts. The judges who receive the packages receipt for them, and by the law this receipt must show that the packages are in good condition when received. (See code Va., Sec. 122e.) The evidence further shows that this man Wright received an official package of 150 ballots, in good condition. (See evidence of Ramsay, a member of the electoral board, Record, p. 417.) Wright was not compellable to receive the package unless it was in good condition, because the law requires him to state the condition when received. The uncontradicted evidence shows that on the morning of the election when Wright turned up with the ballots, the package had been tampered with and the seal defaced. The judges proceeded to count the ballots in this package, which, according to the notation, should have been 150. They found but 149 ballots, and the election was then delayed while they made a record of that fact and sought to get into communication with the law officer of Pittsylvania County to ascertain what to do under the circumstances. (See Record, Robertson, p. 377.)

Mr. CARRICO. Did they not appoint a judge there in the place of Wright, who had not paid his poll tax?

Mr. SAUNDERS. Yes; it is asserted that he had not paid his poll tax, and I want to ask you in that connection what difference did that fact make, even if the charge is true?

Mr. CARRICO. Does not our law provide that all the judges of election must be duly qualified?

Mr. SAUNDERS. Show me the section which requires a judge to have paid his taxes.

Mr. CARRICO. It does not say so in express terms.

Mr. SAUNDERS. Show me the section that makes this requirement in indirect terms or in any sort of terms. Here is the section of the Code, section 118, that relates to the qualifications of judges. (See p. 5 of the Analysis.) I am glad this matter has been brought up in this connection, because I want to ask another question of these gentlemen, and then ask the committee whether they wish to go into certain questions raised in this case. It appears that at one or two precincts in Pittsylvania County the judges who acted were technically disqualified. I do not say that they were appointed by the electoral board, because the record is silent on that point, but it would not make any difference if they had been. They acted and they were technically disqualified. At one place a man was a constable; at another a justice of the peace. Technically, I admit those persons were disqualified from acting as judges by the law of Virginia, but there is no suggestion that at any one of these precincts anyone suffered, or that there was any wrongdoing, or that anything occurred to the prejudice of the contestant. I want to know whether this committee wants to hear any discussion from me, or to have any authorities cited in connection with the mere suggestion of contestant that a judge was disqualified. If it is necessary, I am ready to take up that line, but I do not want to take up the time of this committee on propositions which I deem to be absolutely irrelevant.

It is unquestionably the law with respect to the qualifications of judges that if a man acts, even if he has never been sworn, but there is no charge in the notice of contest that there was any wrongdoing at the precinct at which he acted, and it appears that the votes were honestly cast and honestly counted, then the disqualification of the judge is not sufficient ground for the rejection of the vote at that precinct. As I have said, I would like to know if the committee would like to hear from me along that line, because if they do not it will give me that much more time in which to take up the discussion of other matters. Do these gentlemen insist that this disqualification of a few judges was prejudicial to contestant's interests. I would like to be cited by them, in this connection, to any law upon which they will rely to show that those precincts ought to be thrown out or rejected as a whole at which these disqualified judges acted. If they contend for such a proposition, then I am ready to meet it. If they will frankly abandon any claim of advantage from that feature of the case, then that action will save me and save the committee a needed measure of valuable time.

To come back to the gentleman who was appointed at the precinct of Design by the judges of election. They claim that this man was not a qualified voter by reason of the fact that he was not on the tax list. I assert that it makes no difference if such was the case. He

was certainly a defacto judge and his acts valid. In the case of Sherrill and O'Brien, cited infra, the court of appeals of New York held that a legislature elected under an act which they pronounced to be absolutely void was a de facto body and its enactments legal and binding.

There is a conflict as to whether this judge had paid his taxes. On page 274 of record, bottom of page, the witness there testifying, positively avers that T. M. Smith, the appointee of the other judges, had paid his taxes.

The CHAIRMAN. Suppose he was not a qualified voter, and he was selected as judge of election, and then would have to pass on his own qualification to vote, when he was challenged, because he had not paid his taxes?

Mr. SAUNDERS. If he was entitled to vote, no harm would ensue, if he allowed others in the same situation as himself to vote.

The CHAIRMAN. They have a right to challenge whom they please. Do you think a man who is not a qualified voter at an election has a right to pass upon his own qualifications to vote?

Mr. SAUNDERS. That question does not arise.

The CHAIRMAN. It might arise; I do not know whether it did arise or not. Did this man vote?

Mr. SAUNDERS. I think he did; yes.

The CHAIRMAN. Was any question raised as to the legality of his vote?

Mr. SAUNDERS. Not that I know of, and I want to say, in this connection, that so far as his passing on his own qualifications such action would be an impropriety. In such a situation he ought to stand aside just as a member of the Supreme Court when a case comes up in which he had an interest as counsel, simply declines to act so far as that particular proposition is concerned. There is no evidence whatever that Smith acted on any matter personal to himself.

The CHAIRMAN. I may say I do not know how the committee feel about this proposition; there has nothing been said to the committee so far in the argument of counsel in reference to this particular case. I do not know what they are going to rely on. So far as I am personally concerned, I have no disposition to go into it at all.

Mr. SAUNDERS. I am trying to get from these gentlemen now——

Mr. NELSON. There was no change in the result?

Mr. SAUNDERS. None whatever. At no one of these precincts is there any challenge of the result; in fact, there is no challenge as to any precinct in the district.

The CHAIRMAN. Is there a challenge of the result in the precinct where this man was selected as a judge?

Mr. SAUNDERS. Not at all. I do not, however, want to be misunderstood. There are some votes challenged there, on account of individual incompetency and disability, but no challenge of the return as a whole by reason of this man's acting. Contestant and his counsel are present. If I am mistaken in this statement I am subject to interruption, and I ask to be interrupted.

The CHAIRMAN. There might be a question raised in this precinct as to the number of votes challenged because the voters had not paid the poll tax, and if that judge should have to pass on that it would be an impropriety for him to pass on the disqualification of those who were disqualified by reason of the fact that they had not paid.

Mr. SAUNDERS. There were but few, if any, challenges that I am aware of at this precinct, which raised any questions that the judges as a whole had to pass on, and in which it is shown this man participated. I believe there was one challenge at this precinct which raised a question of residence. In fact, there were but few challenges of votes in the whole district which were submitted at the time the voter cast his vote. The record shows some challenges and the action of the judges thereon.

The CHAIRMAN. Because they had not paid their poll tax?

Mr. SAUNDERS. Yes.

The CHAIRMAN. Would not that go to the very root of the matter, if a judge were selected as judge who had not paid his poll tax and was disqualified as a voter under the laws of his State? He is there to pass on the qualifications of voters; that is part of his duty as judge of the election. He passes on the qualifications of a man who is challenged, and then the next man comes up, and then he offers to vote himself, and the question arises whether he is entitled. He either passes on it, or else his colleagues pass on it, and he says, "I will step aside."

Mr. SAUNDERS. There is no evidence in the record of any such state of facts as that supposed.

Mr. THURSTON. We have challenged the particular vote of this particular judge by showing that he was not a legally qualified voter and that he did vote at that polling place.

Mr. SAUNDERS. Certainly; but he was not challenged at the time. I have stated that already. I will answer the chairman's question. If the voters now challenged were illegal voters, what earthly difference would it make if this man voted to admit them? You have the right now, if they were illegal voters, to exclude them. As a matter of propriety I grant you that this man should not have passed on his own qualifications. But his qualifications were passed on by the other judges when they elected him to sit with them. He had no occasion to pass on them. If any illegal votes were admitted at this precinct, and they voted for the contestee, you are not hindered in any wise from excluding them upon proof of the facts.

The CHAIRMAN. On that proposition I would like to have you confine yourself very largely to the argument on the question as to whether or not they were legal voters.

Mr. SAUNDERS. That is the reason I was asking counsel for contestant to point out to me the provision of our law which incapacitated this man from serving as a judge of election, because he had not paid his taxes. I want them to show me why it was that he was disqualified under the laws of Virginia. I have answered the question of propriety, with respect to his individual case, as contained in the question of the chairman of the committee, but with respect to his alleged disqualification to act in the capacity of judge I would like to be cited to the law disqualifying him. Certainly in all respects he was a de facto judge.

Mr. PARSONS. Is he not an officer?

Mr. SAUNDERS. No; in my view he is not an officer in the technical sense contemplated by the laws of the State.

Mr. PARSONS. Doesn't he take an oath?

Mr. SAUNDERS. Yes. So does an attorney at law.

Mr. PARSONS. If he is not an officer, who are the officers conducting the election?

Mr. SAUNDERS. He is not an officer in the ordinary sense contemplated by the laws; an attorney at law takes an oath, but he is not an officer.

Mr. PARSONS. He is sworn.

Mr. SAUNDERS. Very well, suppose he is an officer, then. Is an officer required to have his taxes paid in order to conduct an election?

Mr. PARSONS. To conduct an election?

Mr. SAUNDERS. Yes. Show me the law on which you rely. Here are the qualifications provided by the Virginia statute.

Mr. PARSONS. Section 118.

Mr. SAUNDERS. Yes. We have been theorizing, but I now wish to read the section itself to the committee [reading]:

> No person shall act as a judge or clerk of any election who is a candidate for, or the deputy or employee of any person who is a candidate for, any office to be filled at such election, or is the deputy of any person holding any office or post of profit or emolument under the United States Government, or who is in the employment of such Government, or holding any elective office of profit or trust in the State, or in any county, city, or town thereof.

Mr. SAUNDERS. Will these gentlemen seriously offer that section as showing that a man must have paid his taxes in order to be a judge of election in the State of Virginia? That section refers to the qualification of a man with respect to the deposit of his own ballot. I am discussing the qualification of a judge of election under the Virginia law. I do not suppose the committee would entertain that section for a moment as authority in this connection.

Mr. PARSONS. The question I asked you is this: Do you contend that the law requires less of a man to be an officer to hold an election than to vote?

Mr. SAUNDERS. Come down to the law, and let us omit our respective theories. I do contend that it does not require as much. I simply contend that the qualifications of a judge of election are fixed by the Virginia statutes.

Mr. CARRICO. If he is an officer, read section 32 of the constitution and see if it does not disqualify him.

Mr. THURSTON. I am not here at this present time to say that this cuts any particular figure, but we do insist that under section 32 of the Constitution a person is not qualified for office, any office in the State of Virginia, except notary public, who is not a qualified voter. Section 32 reads:

> Every person qualified to vote shall be eligible to any office of the State, or in any county.

And the converse is true, by any recognized rule of construction, that a person who is not thus qualified is not eligible to office.

Mr. SAUNDERS. Well, you are getting on a different proposition from the one raised by these gentlemen. You raise the question, who is an officer under the law of the State of Virginia. I am perfectly willing to take that up, if the committee considers it necessary to do so, and to undertake to show you that a judge of election is not, in the contemplation of the Virginia law, technically an officer.

Mr. BENNET. Do you contend that the disqualifications mentioned in section 18 are exclusive disqualifications, or additional disqualifications?

Mr. SAUNDERS. They are the only ones, disqualifications, I take it. We never have considered it otherwise, so far as I am aware.

Mr. THURSTON. From our point of view they are undoubtedly additional disqualifications.

Mr. BENNET. That is your contention, that a man who is disqualified by the provisions of section 32 of the state constitution would be eligible for a judge of elections?

Mr. SAUNDERS. Certainly.

Mr. BENNET. Although he would not be eligible for any office in the State?

Mr. SAUNDERS. Yes.

Mr. BENNET. And that the only disqualifications are those contained in section 118?

Mr. SAUNDERS. Certainly.

Mr. NELSON. Would you say that a man under 21 was qualified to act as judge of elections?

Mr. SAUNDERS. Yes; if he was intellectually capable, and not a mere boy.

Mr. NELSON. A woman?

Mr. SAUNDERS. It frequently happens that clerks of elections in the State of Virginia are under 21. That very question, in respect to a judge being under 21, has been presented to me. Yes, I think he could act. I do not think a woman could.

Mr. KORBLY. If an election officer who is regularly appointed does not show up on the morning of election, an election officer is selected from those who are present?

Mr. SAUNDERS. That is true.

Mr. KORBLY. If a minor is there, he may be put in?

Mr. SAUNDERS. That is the contention; I maintain that proposition.

Mr. BENNET. Would you maintain that an ex-convict or a lunatic, both of them disqualified from holding office in the State, would be eligible as judges of election?

Mr. SAUNDERS. I would say in response to that query that, of course, you can take almost any inquiry and follow it up to the point when the person who has been answering in the affirmative must answer in the negative. There comes a point when distinction becomes very difficult. It is very easy to distinguish midday from midnight, but not the precise time when twilight becomes darkness. You can keep on putting questions until you get to a point where things begin to shade into each other. Of course, I do not contend that a convict ought to be appointed a judge of election, nor do I contend that a woman can hold office in Virginia.

The CHAIRMAN. Except for notary public?

Mr. SAUNDERS. Yes; that is fixed by our constitution. These things are entirely foreign to the case. I am not contending for any such propositions as the above, but I do contend for this proposition, that the section of our code which relates to judges of election provides who may and who may not be judges. Section 118 is the section which relates to the qualifications of judges and clerks of election. It is the one to which one would naturally look, when the electoral board came to appoint the judges and clerks. If there is any other section that provides for and fixes the qualification of

judges and clerks, I do not find it in the code of Virginia. That is all I have to say in this connection.

To come back to this particular T. M. Smith, and the action of the judges in declining to appoint a man named Ferrall, who was offered as a Republican judge on the morning of the election. Design was the only precinct in Pittsylvania County where complaint was made that a Republican judge was not appointed. This man Wright who had been appointed by the electoral board was a Republican. He came to the polls with the official package of ballots in a mutilated condition. There is no contest over that proposition. Wright did not even go on the stand. There is not a dot of testimony here which undertakes to repel the fact that an official ballot was taken while the package was in Wright's possession.

Mr. CARRICO. Did not that man who had it in his possession go on the stand and testify?

Mr. SAUNDERS. No; Wright did not testify at all. When I state that a fact is proven I have always in mind some proposition about which no question can be raised under the evidence or with respect to which there is no evidence at all on the other side. This Wright matter belongs to the latter class. I was just going to say that with respect to this man Ferrall, who was offered as a judge, there is a conflict of testimony as to whether the abstracted ballot was seen in his possession. The testimony of the election officer is that he saw him in the possession of this stolen ballot on the day of election. (See record, p. 378.) Ferrall denies the charge. The committee can weigh the evidence and determine which of the two is proper to be believed. (See analysis, p. 26, for Robertson's as well as Ferrall's testimony.) There is conflict on that point, but there is no conflict over the charge that this ballot was extracted while in the possession of the Republican judge, none whatever. The proof shows that the package of ballots went to him in good condition; it shows that 150 ballots were called for; it shows further that when the package was returned by him the seal had been defaced and the package tampered with. On the face of this injurious testimony Wright did not dare to go on the stand.

Mr. CARRICO. Does it not show it was sealed when the judges got it?

Mr. SAUNDERS. No. The package was broken, and the seal had been tampered with. If you wish to go into that inquiry, I had as soon go into it now, as not. I refer the committee to the evidence in that connection, as afforded on page 26 of the analysis.

The CHAIRMAN. There are some propositions of this case that we are very much more interested in than we are in reference to this question that has just arisen.

Mr. SAUNDERS. I think so, too, Mr. Chairman; but I am ready to meet any questions that may be raised on the evidence in this case.

Mr. THURSTON. We are willing to admit you are loaded on every branch of the case. [Laughter.]

Mr. SAUNDERS. That admission does not help me, if I can not unload with respect to those points that are of greatest interest to me. [Laughter.] If you look on page 26 of the analysis, which refers to the pages of the record, you will find the following as to Wright:

In the county of Pittsylvania, the ballots for the precinct of Design, were delivered to one Wright, who had been appointed Republican judge for that precinct. These ballots were in a sealed package, containing as per the markings, 150. Section 122e of the Code imposes upon the electoral board the delivery of the ballots, and re-

quires the judge who receives them to receipt therefor and give a certificate that the seals have not been tampered with. When Wright brought the package of ballots to the polls on the morning of the election, the other judges ascertained that it had been tampered with, and upon proceeding to count the ballots as required by the section, supra, they found that 1 of the official ballots had been abstracted, and that the package contained only 149 ballots. This fact was clearly established, as the fact that the package of ballots went into Wright's hands in good condition. Wright was not put on the stand to explain the mutilated condition of the package, or to state how it was that a ballot came to be missing therefrom while it was in his official possession.

With respect to the other complaint, that the man Ferrall was not appointed judge, it is admitted that he was offered, and was rejected by the other judges on the ground that Ferrall was suspected of having the missing ballot. Later one of the judges states that he saw Ferrall in the possession of this abstracted ballot. Ferrall denied it. You can look to the record and determine for yourselves on which side the weight of the evidence is found. At any rate, the judges did not appoint him, but appointed another man, as they had the right to do. There is no requirement of the Virginia law that when a judge has to be picked up on the ground he must be of any particular party affiliations. To make this an imperative requirement might frequently cause an inconvenient delay in opening the polls. There is a conflict as to whether any other Republican than Ferrall was offered for appointment. Witnesses for the contestant claim that other Republicans were there. Witnesses for the contestee deny it. This is not material, but the committee can weigh the testimony submitted on both sides.

Now, Mr. Chairman, I will take up the county of Henry. I stated a few moments ago that there was gone from this case that feature of it which embodies the claim that the judges of election were not appointed in conformity with law, and that the contestant did not have adequate minority representation at the various election precincts in the district.

The evidence taken in the county of Henry is to the effect that the members of the contestant's own party organization in that county were advised with by the electoral board with respect to the appointment of minority judges, and expressed themselves as being satisfied with the appointments theretofore made. (See Record, p. 249.) Complaint is made as to a judge at one precinct in Henry, the precinct of Mayo. And, by the way, I wish to direct the attention of the committee to the fact that the judges who acted in the election of 1908 were not appointed with special reference to that election, but were practically nearly all holdovers.

The republican judge who was appointed for the precinct of Mayo failed to appear on election day. Hence an appointment had to be made by the other judges and the appointee was a lifelong Republican. (See Record, p. 234. Taylor's evidence.) There are no complaints as to the judges in the counties of Patrick, Carroll, and Grayson, and the city of Danville.

With respect to the county of Franklin, there are complaints made as to two judges, but I will not at this time take up these cases, because I wish to hasten on to the other matters in which you say you are more interested. But I affirm again, that with respect to the general claim that the contestant did not get minority

representation, it has been utterly refuted by the evidence to which I have directed the attention of the committee. The complaint as to the Franklin judges is without merit.

The contestant concludes his brief as follows:

> It is doubtful if a case could be presented showing generally such irregularities in the conduct of a congressional election as is presented by the record in this case. There was open and deliberate violation of the election laws of Virginia in forming so many of the election boards without permitting a Republican to be on the same.

I invite the contestant to cite me any evidence in support of that allegation. Stop me now, and tell me where such evidence can be found in the record.

Mr. PARSONS. I will ask you this question, whether a single Republican was on any election board.

Mr. SAUNDERS. I will answer that question by asking you this one: Is there any law in the State of Virginia that requires that a Republican be appointed on the electoral boards? I am talking about rights under the law. If the statute does not make this requirement you can argue, if you choose, that the law is not fair, but you can not maintain that it has been violated by the failure to appoint Republicans. Contestant and contestee alike stand on their legal rights, and if a law does not require a Republican to be appointed on the electoral board, no breach of the law has been committed by the failure to appoint one. I might as well complain that the deputy marshals and postmasters in my district are appointed from the Republican party when appointments are made.

The CHAIRMAN. Do I understand you to take the position that the Republicans had been treated fairly in the selection of judges there?

Mr. SAUNDERS. I do, in strict conformity with the law.

The CHAIRMAN. And that the proper number of Republicans had been appointed.

Mr. SAUNDERS. Yes. I say that every right to which they were entitled under the law was given to them in this respect.

The CHAIRMAN. I understand. But after the judges of election had been appointed, in the morning when they get together, if there is one absent, you claim in one place that a life-long Republican was appointed as judge of election, and you challenged the other side to point to a single place where they did not have representation.

Mr. SAUNDERS. Pardon me, Mr. Chairman, Mr. Parsons interrupted me, to ask if there was a member of an electoral board in the Fifth District that was a Republican, and I answered him by saying that, so far as I knew, I did not know of one. I might have asked him if he or his friends were giving the Democrats any appointments in Virginia, but I did ask him to point me to the law which required that Republicans should be appointed on the electoral board. There may be Republicans on some of the boards, but if the law does not require them to be placed thereon, no breach of the law has been committed by the failure to appoint them.

Mr. THURSTON. If it will help the situation any, we are ready to admit that at most of the polling places there were "near" Republicans appointed.

Mr. SAUNDERS. You will have to admit something more than that. Why do you call the Republican appointees "near Republicans?" Why will you not say that they were straight-out Republicans?

There is no complaint that the Republican appointees were "near Republicans," save in one or two instances which are fully discussed in contestee's analysis.

I am glad that I have been asked this question about the electoral boards. How can contestant come before a committee sitting as judges and claim that a law has been violated when he can not point out the provision of the law which he alleges has been broken? What is the use of complaining that Republicans have not been appointed on electoral boards, if the law does not require that this should be done?

Mr. NELSON. Is there any claim that an electoral board made up of one party has caused any loss of votes?

Mr. SAUNDERS. I can not say as to the claim, but I do say there is not a particle of evidence in the record to support such allegations, if it is claimed that they have been anywhere made.

Mr. NELSON. Because you would not claim that if the State of Virginia has such a law, and that it results in disfranchising the Republicans, this committee would not have the right to go beyond that?

Mr. SAUNDERS. Not at all. As I said in the conclusion of my answer, after referring to that portion of contestant's notice, in which he admitted that he had not made a sufficient technical statement of his case, "I have no desire to avail myself of technical objections to hinder the contestant from making out his case, provided I am given the opportunity to reply." I said to the gentleman then, and I stand by that statement now: "Take off the lid in the fifth district of Virginia, and exhibit any irregularities, any conspiracies, or any wrongdoing which has affected you to your prejudice. I will not invoke any technical law to keep you from doing this." If the contestant has been prejudiced in his election in any way of which the law will take cognizance, by the action of any election official in the fifth district, or if any action was taken there which has operated to wrongfully deprive this contestant of a single vote, and the loss can be traced to this action, so that he has lost a vote which he ought to have received, I am perfectly willing for the committee to take up the inquiry and do justice. I am not interposing any objection to any proper inquiry. But I do not conceive that there is any breach of law in failing to make appointments of a particular political complexion when the law does not require it to be done. There are a great many appointments made in this country, and when there is no requirement that these appointees shall be of any particular political faith, I notice that in some States Republicans are appointed and in others Democrats, according to the party which happens to be in power. So much for that. I read further from contestant's brief:

> There was gross neglect and violation of duty on the part of the officers who were required to prepare and present for the use of the election boards poll-tax lists as required by law.

There is not a jot or tittle of evidence in this case of any improper manipulation of these poll-tax lists, except in the counties of Carroll and Grayson, where there were large Republican majorities and Republican officials. Mr. Carrico said on yesterday, with respect to the red-ink emendations in Grayson County, that the law provided

that additions should be made to the lists made by the courts, and that the clerk of the court should include in the list the parties who were entitled to be included by virtue of these court orders. If, Mr. Chairman, the evidence shows that there is a single addition, on the part of the clerk of a single court, by virtue of conformity to that law, I have not a word of criticism to make as to such an addition. But there is no evidence of that sort in this case. In the county of Grayson the evidence is that on the night before election the treasurer of that county was adding to these tax lists. It was not the clerk, but the treasurer, who made the additions, and the evidence through this record is that in this county the voters were continually going to the treasurer and getting him to add their names to the list. I make a formal objection to this practice, because the contestant says in his notice and brief that after the list is once made up, as required by law, thereafter the treasurer can not dot an "i" or cross a "t" in connection therewith. That contention on his part is well taken, and I concur with it.

Mr. CARRICO. If the emendations that you speak of in red ink were not put on there by order of the court, and the clerk certifying this record out to the different judges of election being conclusive evidence, why was it not shown that the court did not place them on it?

Mr. SAUNDERS. It is not conclusive evidence, because the evidence is that the treasurer was doing it on the night before election, and at other times, and the clerk does not go on the stand to show that the additions to the list were made by virtue of court proceedings, nor does the treasurer go on the stand to show why he was working on the lists the night before the election. The additions made by the treasurer are illegal and were not binding on the judges of election.

Mr. CARRICO. I think we differ on that.

Mr. SAUNDERS. I will take up this matter in connection with the evidence taken in the county of Grayson. In the county of Carroll, it is shown by one of the Republican judges of election——

Mr. BENNET. Will it interrupt you for me to ask you a question?

Mr. SAUNDERS. Not at all.

Mr. BENNET. Is it not a fact that in the statement of this case by the chairman he said that there was no charge of fraud that had been relied on, and I could not understand in the opening argument that there was any charge of fraud.

Mr. KORBLY. Moreover, that statement went unchallenged at the time.

Mr. SAUNDERS. I am simply calling the attention of the committee to the fact that charges of fraud and conspiracy were most abundant in the notice, and that these charges are not urged, on the part of the contestant, for the simple reason that he has ascertained that he can not sustain them before this committee. This is the first time I have been able to bring public attention to the fact that these sweeping allegations of wrongdoing, as contained in the notice, are utterly unsupported by the evidence in the record.

Mr. BENNET. I would like to ask you a question about the treasurer adding the names; it is rather interesting. Under your statute if an elector had gone before the circuit judge on five days' notice, as provided by your statute, and the judge had made an order directing

his name to be put on the tax-paid list, whose duty would it have been to have added his name?

Mr. SAUNDERS. The clerk's.

Mr. NELSON. What is the purpose of giving notice to the treasurer?

Mr. SAUNDERS. That is a requirement of the law, and a just one. The treasurer makes up the list in the first instance, and he is cited to show why he failed to put on his list the voter who asserts in his petition to the court that he has been negligently overlooked.

Mr. TOU VELLE. While you are looking that up, perhaps you could answer this question: I understand that the contestant has abandoned any proposition of fraud. Is your argument going to the effect of charging fraud on the other side?

Mr. SAUNDERS. Yes; abundant fraud on the other side, abundant evidence of bribery on the other side, abundant evidence of the improper use of money on the part of contestee's friends. (See pp. 18–19 et seq. of the analysis.) This evidence is in the record, uncontradicted and unchallenged. You asked me, Mr. Bennet, what is the law of Virginia in respect to sending out the tax list. If you will look at section 38 of the constitution of Virginia, found on pages 9 and 10 of the analysis, you will find the answer to your question. I think it is well enough for the laws of Virginia to be cited in connection with these queries. To some extent, as a matter of course, the questions of counsel and of the committee tend to hinder me from making a continuous argument, but I do not object to interruptions, for the reason that they enable me to get before the committee in the present connection some references that otherwise would have to be made at a later period of the argument. The committee will note the following provision of section 38, relative to sending out the tax lists:

> The clerk shall deliver, or cause to be delivered, with the poll books, at a reasonable time before the election, to one of the judges of election of each precinct of his county or city a like certified copy of the list, which shall be conclusive evidence of the facts therein stated for the purpose of voting. The clerk shall also, within sixty days after the filing of the list by the treasurer, forward a certified copy thereof, with such corrections as may have been made by order of the court or judge.

I think that citation from section 38 affords the answer to Mr. Bennet's question.

Mr. BENNET. No; it is not a complete answer.

Mr. SAUNDERS. What is the additional answer you want?

Mr. BENNET. It says:

> The clerk shall deliver, or cause to be delivered, with the poll books, at a reasonable time before the election, to one of the judges of election of each precinct of his county or city a like certified copy of the list, which shall be conclusive evidence of the facts therein stated for the purpose of voting. The clerk shall also, within sixty days after the filing of the list by the treasurer, forward a certified copy thereof, with such corrections as may have been made by order of the court or judge, to the auditor of public accounts, who shall charge the amount of the poll taxes stated therein to such treasurer unless previously accounted for.

Mr. SAUNDERS. The last certified copy goes to the auditor of public accounts. Thus a double check is afforded on these court additions to the tax list.

Mr. BENNET. That does not say specifically who has to make the corrections in the list. That simply says that the clerk shall perform a ministerial duty—that is, that he shall forward a list which has been

corrected by order of the judges—but the list starts in the first instance from the treasurer, does it not?

Mr. SAUNDERS. Yes.

Mr. BENNET. Is there anything in your statute which says it is or is not the duty of the treasurer to carry out the order of the circuit judge?

Mr. SAUNDERS. The contestant in his brief and in his notice asserts, and I agree with him, that after the treasurer has once put his list in the hands of the clerk he can not touch it thereafter. Contestant asserts that himself. I agree to it as a proposition of law, so why discuss it? (See Record, p. 11, top of page. Contestant's first brief, p. 26.)

Mr. NELSON. If the court decides that they should properly go on there, does he not put them on?

Mr. SAUNDERS. No; the clerk puts them on. The treasurer is not an officer of the court. The clerk makes the additions.

Mr. KORBLY. When a vote is challenged, what steps are taken at the polls? Does the man offering to vote file an affidavit setting up his right to vote?

Mr. SAUNDERS. There is no particular form in that respect. When a vote is challenged, the voter can be sworn, if it is desired for him to make a statement under oath as to the matters called in question. Other evidence, oral or documentary, can be taken in addition, if desired by any party to the challenge.

Mr. BENNET. If I am interrupting you too much, stop me.

Mr. SAUNDERS. No; as I said, these interruptions enable me to get these different sections of the Virginia law before the committee. Then I can go on without having to refer to them. Now, look at the middle of page 10 of the Analysis:

> The original list returned by the treasurer shall be filed and preserved by the clerk among the public records of his office for at least five years after receiving the same. Within thirty days after the list has been so posted, any person who shall have paid his capitation tax, but whose name has been omitted from the certified list, may, after five days' notice in writing to the treasurer, apply to the circuit court of his county or corporation court of his city or to the judge thereof in vacation, to have the same corrected and his name entered thereon, which application the court or judge shall promptly hear and decide.

You will note that the law requires the treasurer to make a list. That list is sent to the clerk and later is posted. It is posted at all the precincts in the county and the wards in a city. There are no laws in relation to election matters that are simpler than the present laws of the State of Virginia, and none more effective, to afford a man a chance to be heard or an opportunity to correct a mistake.

Mr. BENNET. Then your contention is that, although section 38 requires the notice to be given to the treasurer, the order of the judge is directed to the clerk?

Mr. SAUNDERS. Of course. It is a court proceeding, absolutely, just as you will find, under our laws, many instances with respect to applications to the court for relief from errors in assessment in which the applicant gives notice to the Commonwealth's attorney and to the treasurer of the county, but the order made is the order of the court. This order is certified by the clerk, who is an officer of the court, and entry of the same is made in the court records.

Mr. NELSON. When a clerk has that permission from the judge, he brings that——

Mr. SAUNDERS. No; you see the applicant whose petition is granted is added to the treasurer's list by virtue of the order of the court.

Mr. NELSON. On the poll-tax list?

Mr. SAUNDERS. Yes. He goes on the list. He is added to the poll-tax list, as contemplated by section 38, when a man conforms to its requirements.

Mr. THURSTON. It would be a remarkable thing, Mr. Saunders, if the treasurer, who is the one defined in that proceeding, was not the party to be authorized by the court to make the correction.

Mr. SAUNDERS. He is not the authorized party, nor could he be such, since the list which is to be amended is no longer in his possession but is in the custody of the clerk of the court.

Mr. THURSTON. There is nobody else before the court.

Mr. SAUNDERS. You are arguing a proposition, Senator, that is contrary to the position taken by your client, but I will say in this connection that the analogy is precisely that of a man who gives his adversary notice to obtain judgment. When the judgment is obtained it is the judgment of the court, and it is entered up and certified by the clerk who is the hand of the court.

Mr. THURSTON. I am not insisting this is material to the case at all, but I am rather interested in this school of discussion.

Mr. SAUNDERS. The treasurer is cited to appear because he has made the list, and he is required to show cause why the applicant's petition to go on the list should not be granted.

I can give you a sufficient reason for bringing in the treasurer as a party to the application. The taxpayer who has been omitted from the list alleges in his petition that this omission is due to the negligence of the treasurer. Hence when his notice brings the treasurer before the court, the latter in substance says to this officer: "Why did you not put this man on the list? He asserts that he is qualified. What have you to say for yourself?" Then the treasurer must furnish his explanation. If the application is allowed the voter is ordered to be placed on the list, which, as I have stated, is in the custody of the clerk and not of the treasurer. Moreover, this list in the amended form is required to be certified to the auditor of the commonwealth, as a permanent record in the archives of the State. This, you will note, is required to be done by the clerk of the court (see sec. 38). The treasurer has nothing further to do with the list after he forwards it to the clerk, and, as contestant very properly observes in his notice and brief, any subsequent addition to the list on the part of the treasurer is a violation of law.

Mr. BENNET. Yes; but the tax pay list, that is in the custody, by that time, of the judges of election——

Mr. SAUNDERS. Up to the time under discussion the list has not reached the judges.

Mr. BENNET. When does it reach them?

Mr. SAUNDERS. After the additions provided for by law have been made.

Mr. BENNET. Let us see about that. There is a list that goes to some one thirty days before the election; to whom does that list go?

Mr. SAUNDERS. That is the list we are talking about.

Mr. BENNET. And that is posted?

Mr. SAUNDERS. No; the list that is posted is the list that is sent by the treasurer to the clerk of court at least five months before election. (Constitution, sec. 38.)

Mr. BENNET. You do not mean to say that that list is posted for six months?

Mr. SAUNDERS. Within ten days of the receipt of that list by the clerk he places a sufficient number of copies of the same in the hands of the sheriff or sergeant for posting at the front door of the several polling places in the county or city, as the case may be.

Mr. NELSON. That is simply to give warning?

Mr. SAUNDERS. Yes.

Mr. BENNET. Is that posted six months?

Mr. SAUNDERS. No; not so much as that. The list is lodged with the clerk at least five months before the election, and copies of same are forthwith posted. There is no requirement that they shall be taken down. Hence they may stay posted indefinitely.

Mr. BENNET. And it is that list which the voter has to consult to show if he is on there?

Mr SAUNDERS. That is the list. He is not confined to consulting the list at his precinct, but it is generally the most convenient one.

Mr. BENNET. But, as a result of the order of the judge, that particular list does not change?

Mr. SAUNDERS. The list that is posted at the various precincts may be changed by order of court. The changes are made in the way of corrections in the original list, which was filed with the clerk by the treasurer, pursuant to law. The lists which are posted are copies of this original.

Mr. BENNET. Where is the original?

Mr. SAUNDERS. In the custody of the clerk of the court.

Mr. BENNET. At the county seat?

Mr. SAUNDERS. Yes; at the county seat, at the court-house.

The CHAIRMAN. The treasurer makes up the list in the first place, does he not?

Mr. SAUNDERS. In the first instance, yes.

The CHAIRMAN. A large number of persons may be denied a place on the list?

Mr. SAUNDERS. Yes; that may happen.

The CHAIRMAN. And they go to the court?

Mr. SAUNDERS. Yes; if they desire to do so.

The CHAIRMAN. And the court issues an order. To whom is that order issued?

Mr. SAUNDERS. To the clerk.

The CHAIRMAN. Or to the treasurer?

Mr. SAUNDERS. To the clerk.

The CHAIRMAN. Suppose there is no compliance with that order?

Mr. SAUNDERS. How do you mean compliance with the order?

The CHAIRMAN. By putting the names on the list.

Mr. SAUNDERS. Well, that suggests a very interesting situation. According to the contention of these gentlemen, those voters could not vote, by reason of the fact that they were not on the list, though this failure was due to official negligence, and not to any fault of theirs.

The CHAIRMAN. That is not an answer to my question.

Mr. SAUNDERS. I think it is, unless you have something else in mind.

The CHAIRMAN. Suppose the clerk and treasurer both decline to put the names on the list after the judge decides they should go?

Mr. SAUNDERS. Very well.

The CHAIRMAN. If you wanted to get them on, what could you do?

Mr. SAUNDERS. Simply this, the voter would apply to the court for a mandamus to compel the clerk to perform the ministerial act of adding to the list the names which the order of the court had theretofore ordered him to add.

The CHAIRMAN. You would not make the treasurer a party to that?

Mr. SAUNDERS. No; he is out of it. He was brought in first, as the Commonwealth's attorney is brought in, when you seek to correct an erroneous assessment. He is merely required to show cause why the applicant's request should not be granted.

Mr. KORBLY. Would not the clerk be in contempt if he refused to carry out the order of the court?

Mr. SAUNDERS. Certainly, but I was answering the chairman's question. Of course, if the clerk failed to carry out the order of the court he could be punished for contempt. But, apart from that, a mandamus would lie to compel him to perform the ministerial act of adding these names. There is no trouble at all about the legal remedies. But the chairman's question is a very pertinent one when considered in connection with contestant's argument that presence on the list is a prerequisite to voting. I thought he had in mind the status of a man who had obtained an order from the court directing his name to be placed on the list but who had subsequently been omitted by the negligence of the clerk. In such a case, according to the contention of contestant, though he had taken all the steps required by law, he could not vote. According to my contention he could vote, because he could prove that he had paid his taxes, or that the court had ordered him to be placed on the list. That is one of the illustrations I expect to use when I come to that portion of my argument, in which I shall undertake to show to the committee that the constitution does not require a voter's name on the tax list as a prerequisite to voting.

The CHAIRMAN. Suppose the court had decided that they were not entitled to go on the list; that if they appeared at the polling place——

Mr. SAUNDERS. No; that would be a case where they had been parties to a court proceeding, and of course the findings of the court would stop them from maintaining any contention in conflict with those findings.

Mr. BENNET. Carrying that just a little further, suppose a voter in one of these precincts—we will take Mount Zion.

Mr. SAUNDERS. That was not much of a Zion for me, though. [Laughter.]

Mr. BENNET. Suppose a voter in that precinct had gone to the circuit judge and the circuit judge had made an order in vacation refusing to add his name to the list. While that is a matter of public record, in a strict sense, it was not a matter of wide publicity, possibly. Supposing a voter had gone with his three tax receipts to the judges of election in Mount Zion on election day and had sworn he had

paid the full three years' taxes in time. You say that they ought, despite the fact of the order of the court, take his vote?

Mr. SAUNDERS. No; I just answered the chairman to the effect that under the circumstances indicated the voter would have no right to do anything of the sort.

Mr. BENNET. He would have no right, but the judges of election would have no knowledge.

Mr. SAUNDERS. If he did such a thing as that his vote would be illegal, and if it was cast for the contestee and that fact could be proven of course this committee would eliminate it, and if cast for the contestant upon proof of that fact you would deduct it from the contestant's vote. Of course that would be a fraudulent vote, just as a man's vote would be illegal if without the payment of his taxes his name had been fraudulently included in the tax list, whether by the clerk or the treasurer. I want to show you in this connection——

Mr. HOWELL. There is another case that comes to my mind, and that is the case of a voter who had not applied to a court to have his name put on the list, but on the day of election he presents proof to the judges of election of his right to vote by reason of having been a poll-tax payer for three years. Would you contend he had a right to vote?

Mr. SAUNDERS. Absolutely; because the constitution says that when a man shall have paid his taxes for three years prior to the year in which he offers to vote, and within the prescribed time, he is at once, ipso facto, by virtue of that payment, clothed with the right of suffrage. Certainly, I contend that such a voter is entitled to vote.

Mr. CARRICO. I see you want to go strictly by the law, and the law before 1908 was not mandatory that the treasurer should date the day on which the poll tax was received. Suppose a voter three days previous to election would pay up a poll tax assessable against him, and then come in and present his tax receipts and offer to qualify?

Mr. SAUNDERS. In the first place, if that voter swore that he had paid his taxes six months prior to the election, when as a matter of fact he had not done so, he would be guilty of perjury. His vote, under such circumstances, would simply be an illegal vote.

Mr. CARRICO. Suppose, as the record shows in a great many instances, he does come in, and state that he has paid his poll tax?

Mr. SAUNDERS. I do not know about so many instances, but if, as a matter of fact, the voter satisfies the judges that he has paid the required taxes, he is entitled to vote. The payment of the prescribed taxes within the prescribed time is the prerequisite of the constitution. There is no other prerequisite with which I am acquainted, so far as the taxes are concerned.

Mr. HOWELL. I would like to have this cleared up in my mind. It seems to me that under the laws of Virginia these poll-tax lists are regarded as sacred, as not to be interfered with, unless by an adjudication of the courts.

Mr. SAUNDERS. Well, they can not be added to save by order of court, but that does not mean that the presence of a voter's name thereon is a prerequisite to the right to vote.

Mr. HOWELL. Under the answer to my last question you really vest the judges of election with the authority which your law vests in the court.

Mr. SAUNDERS. Not a bit. The action of the judges of elections does not add anything to the tax list, which is prepared by the treasurer from his books. But your question suggests to my mind another query, just as the question that was asked by the chairman suggested an interesting query in that connection. Take the case of a man who has actually paid his taxes in time and has his tax tickets in his pocket, ought he to be excluded on election day if he has been negligently omitted from the list?

Mr. HOWELL. Why did he not go according to law?

Mr. SAUNDERS. He is going according to law when he proves to the satisfaction of the judges of election that he has paid his taxes.

Mr. NELSON. He has a choice.

Mr. SAUNDERS. You took the word out of my mouth. He has a choice in that respect. I will show you that it is well for a voter to be on the list for purposes of convenience. These considerations of convenience furnish a sufficient justification for his making the application. But at the time the list is posted a voter may be out of the county. Frequently voters are. Frequently it happens that a man hasn't the opportunity to take these steps within the thirty days prescribed. Frequently his business is such that he does not see the list, and if he has a choice he ought not by reason of failure to exercise one form of choice be debarred from his constitutional right of suffrage. The other road to the polls ought to be open to him.

The CHAIRMAN. What would be the sense of him going to court and hiring a lawyer?

Mr. SAUNDERS. He does not need to hire a lawyer.

The CHAIRMAN. What would be the sense of his going to court if all he had to do was to go to the judges on the day of election?

Mr. SAUNDERS. I will tell you why. I contemplated taking that up later on in my argument. The answer to that is this: The list, by virtue of the constitution, and by virtue of the statute laws of Virginia, which simply follow the constitution, is made conclusive evidence of the facts it contains for the purposes of voting. So that when a man who is on the list comes to the election and some question about the payment of his taxes, all that he needs to do is to say to the judges: "Look at the list. I may be improperly on there, but, so far as you are concerned, if I am there, I have a right to vote." Otherwise, when he comes to vote and is challenged, he may have trouble in proving his payments. He may not have his tax tickets with him; the treasurer to whom he paid them may not be available; he may not be in a position to satisfy the judges that he has discharged the constitutional prerequisite. Therefore it is to his interest, if opportunity offers, for him to get on this list.

The CHAIRMAN. Would he not have to present the same evidence to the court that he would to the judges of election?

Mr. SAUNDERS. Exactly.

The CHAIRMAN. If he had the evidence to present to the court.

Mr. SAUNDERS. He may not be in a position to go to the court. That is the question I am presenting. Many people are not in this position. Many are traveling men, and frequently it is not convenient for them to come back, maybe a great distance, to go into the court. Frequently the judge is in another county. Of course, a man can come back, but it may be inconvenient for him to do so. There is no technical difficulty about making the application. Is it

a practical difficulty, growing out of the fact that the voters are, in many instances, not apprised of the situation in time to avail themselves of the opportunity afforded by the statute to get on the tax list.

Mr. THURSTON. If it does not interfere, that arises in every case of a registration law. Hundreds of people are out of the State during the time in which they might register. Does the fact that they are out of the State prevent their right of suffrage?

Mr. NELSON. On that point, Senator, as I understand Judge Saunders's contention, the matter of the poll-tax list is like the registration law in my State. You can register so as to avoid the difficulty of swearing in at an election, but you can come in, and if you can satisfy the election judges that you are a qualified elector by filing an affidavit, with two corroborating affidavits, you have a right to vote.

Mr. THURSTON. Most of the States have a provision whereby you can have a right to swear your vote in. In my State you can secure a certificate from the county clerk, or make a due proof there that you were absent from the State, but if you were not expressly authorized by statute you could not do it. It has been held over and over again that a man, in order to avail himself of the right to vote, must comply with the registration law, and where there is no provision by which he can swear his vote in, unless he has been there and registered, he could not vote at that election.

Mr. SAUNDERS. That is entirely true. I do not gainsay that proposition of law, but the question of the gentleman suggests an interesting situation in that connection and I am going to take it up while I have it in mind.

Mr. CARRICO. Suppose this question should arise. You understand our statute provides a man may apply within thirty days to be placed on this list?

Mr. SAUNDERS. Yes.

Mr. CARRICO. Suppose he applies to the court forty days after the poll-tax list is prepared, and the court turns him down, would he then be a legal voter?

Mr. SAUNDERS. Certainly he would be. The court would be without jurisdiction in the case supposed, and its failure to afford a hearing, or its action in refusing a hearing under the circumstances indicated, would not hinder the voter from asserting other rights elsewhere. What the Senator says with respect to registration is absolutely true, and yet it is true in that connection that if a man performs on his part what is necessary to be done for the purposes of registration, and there is any failure on the part of the officer to properly record him, that man, on proof of the facts supposed, can be admitted to vote by the judges of election.

The CHAIRMAN. That would have to be under the law of the State.

Mr. SAUNDERS. Certainly; I am claiming to proceed under the law of my State. But it is a general principle of law that when a voter does what the law requires of him, and the failure to perform thereafter is the failure of some official, then that failure does not affect the voter. That is a general proposition, in respect to the right to vote, which is universal, as I understand, throughout the United States.

The CHAIRMAN. Under your state law he is required, in the first place, to go to the court. Now, he has not gone to the court; he has

failed to comply with the requirement. Where is there any other requirement different from that laid down by the law?

Mr. SAUNDERS. To go into that would require me to take up the entire question that I expect to discuss at a later stage of my argument. I maintain the proposition that our constitution does not require a voter who has paid his taxes to go to the court to get on the list under penalty of losing his vote.

The CHAIRMAN. All he has to do is to go to the judges of election.

Mr. SAUNDERS. If he prefers to take that course. He has his choice between getting on the list and proving his case before the judges of election.

The CHAIRMAN. The only point I am anxious about there is, I want you to point out to the committee whether there is any remedy for the voter in your State if he does not comply.

Mr. SAUNDERS. There is no remedy unless he is permitted on election day to go to the judges of election and say in substance: "I demand to be allowed to vote on proof of payment of my taxes. The constitution gives me a right to vote upon payment of the prescribed taxes in the prescribed time. I am prepared to show that I have discharged the constitutional prerequisites, and as such am a legal voter."

The CHAIRMAN. Then, is there any necessity for a list at all?

Mr. SAUNDERS. The necessity for the list has been pointed out in answer to the question of the gentleman from Wisconsin. The list is a matter of convenience for the voter, because the law says, once on that list, even if you have not paid your taxes, you are entitled to vote To show you how far this principle goes, I will call your attention to the fact that in the county of Carroll the treasurer put on the list a man who was on the delinquent list, as is established by the evidence. Yet that man, although he had no moral right to vote, walked up and voted by virtue of this tax list, merely because it was conclusive evidence that he had paid his taxes, for the purposes of voting.

Mr. BENNET. Was he challenged?

Mr. SAUNDERS. No; he was not challenged, but the failure to challenge him made no difference.

The CHAIRMAN. Would it not have made a difference? Suppose he had presented himself to vote, and you challenged him?

Mr. SAUNDERS. In the case I speak of, the voter was on the list.

The CHAIRMAN. Is that list conclusive?

Mr. SAUNDERS. Absolutely, of its contents, for the purposes of voting.

The CHAIRMAN. You could not introduce any evidence?

Mr. SAUNDERS. You can not introduce any evidence to contradict its contents. The constitution makes the list, so far as any contest of same is concerned, absolutely conclusive evidence of the facts therein stated for the purposes of voting. Hence, if a man appears on the list for three years as having paid his taxes, though as a matter of fact, he has never paid a dollar of them, he is entitled to vote.

The CHAIRMAN. Suppose you challenged him because he had not paid the taxes, and you came to Congress with a contest; what would Congress do?

Mr. SAUNDERS. When you came to Congress with a contest, the committee would go back of the list. They would say, in substance,

to the illegal voter: "While you were able to force your vote upon the judges, by virtue of the fact that the evidence which you offered was conclusive for the purposes of voting, yet, as a matter of fact, you were an illegal voter, because you had never paid your taxes."

Mr. BENNET. What is the number of that constitutional section?

Mr. SAUNDERS. Thirty-eight. It is on pages 9 and 10. It begins on page 9 of the analysis.

Mr. TOU VELLE. Have they any rule or class of evidence that is necessary to be furnished to these judges upon which they base their decision as to qualifications?

Mr. SAUNDERS. None whatever, except this list, and that on one point alone, and the registration books.

Mr. TOU VELLE. As to the others, those who are not on this list?

Mr. SAUNDERS. It devolves upon them to show that they have performed the constitutional prerequisite, which is the payment of taxes for three years prior to the year in which they offer to vote, at least six months prior to the election.

Mr. CARRICO. Can you cite any law as to that?

Mr. SAUNDERS. I stand upon the constitution. In addition, I will cite the decisions of several state courts.

Mr. BENNET. Before you leave that, in order to get it straight, you said yesterday that I stated the contention between the two sides accurately. I will state it for the benefit of Mr. Tou Velle, because he was not here at that time. The contestant contends that the constitutional provision in relation to the posting of the list and the putting on of additional names by the circuit judge, and the five days' notice to the treasurer, is conclusive, and that the list so made up is the only evidence of tax-paid voters of that precinct that can be considered. Your contention is that the constitution providing that an otherwise duly qualified elector who has paid his poll taxes for the three preceding years is qualified to vote, that the proof can be made aliunde to the judges of election on election day, despite——

Mr. SAUNDERS (interrupting). The fact that he is not on the list?

Mr. BENNET. Yes.

Mr. SAUNDERS. Yes, sir; that is correct.

Mr. KORBLY. In other words, the contestant contends that the list is also a prerequisite to vote, whereas the contestee contends that the payment of taxes is the sole prerequisite?

Mr. SAUNDERS. Yes, that is true.

Mr. CARRICO. I beg your pardon.

Mr. SAUNDERS. Well, I will state the proposition, and then you can see if you differ with me. Mr. Chairman, the contestant contends that you must pay your taxes, and in addition contends you must be on the list, so he insists that there is a double prerequisite. I contend that you must pay your taxes as required by law, and that the list is merely one means of showing that you have performed the constitutional prerequisite, not that the list is a prerequisite, but is an evidence of the fact you have complied with the requirements of the constitution. It is an evidence of payment, but not the exclusive and only evidence.

Mr. THURSTON. Our contention is very simple and very clear. We do not want to be misunderstood about it. Our contention is that where the law, the constitution and the law, have provided for a registered list of tax-paid voters, has provided that that list shall be made

public in a manner pointed out by the statute, thereby giving notice to everybody who is interested, the statute and the constitution then have given a remedy by which his name can be placed upon that list if he is not there before election day; that that is his sole remedy; that does not confer on any other body or tribunal the power to put him on that list, and that that list itself, made up after a party has had his remedy given by the statute, is conclusive, both as to the right of the men on there to vote and of the fact that nobody else on there had the right to vote.

Mr. KORBLY. In other words, presence on that list is a prerequisite to the right to vote?

Mr. SAUNDERS. That is their contention, exactly as I have stated it. My own contention is that payment of taxes in the prescribed time is the only prerequisite to the right to vote in Virginia, providing, of course, always, that you are duly registered.

Mr. CARRICO. One more thing, Judge, before you pass on from that. In section 38 of the constitution we claim that there the constitution provided what evidence should be received as to the fact that they had paid their poll tax.

Mr. SAUNDERS. That I deny, so far as it is contended that the list is the exclusive evidence of payment.

Mr. CARRICO. It also goes on to say that the legislature may prescribe any other form of evidence. It says: "Further evidence of the prepayment of the capitation taxes required by this constitution as a prerequisite to the right to register and vote may be prescribed by vote." We claim that no further evidence has been prescribed.

Mr. SAUNDERS. There is no difference of understanding between us as to your contention. I know your contention exactly. In addition to that, and merely as another illustration of their proposition, contestant claims that this list is not only conclusive, inclusively, but conclusive, exclusively.

Mr. CARRICO. That is right.

Mr. SAUNDERS. I will discuss that proposition later. Instead of holding that the list, as I said before, is a prerequisite, I regard it merely as one of the evidences by which a man can prove that he has discharged the constitutional prerequisite.

The CHAIRMAN. Has this question ever been before the courts in your State?

Mr. SAUNDERS. It has been before the lower courts.

The CHAIRMAN. What do they say about it?

Mr. SAUNDERS. I will submit in this connection and on this precise proposition the conclusion of two visi finus courts, which hold that presence on the tax list is not required as a prerequisite to voting.

Mr. CARRICO. The court in our district holds differently.

Mr. SAUNDERS. I do not know anything about the attitude of the court in your district. You ought to have that opinion here. The opinions which I will file are not ex parte opinions, but are opinions delivered in election contests in which the precise proposition raised in this case was presented for decision. There is no need for these opinions, in my judgment, for a careful perusal of the Constitution will satisfy the committee that my contention as to its meaning is correct. Still I will file them.

Mr. PARSONS. Was that since the statute was enacted?

Mr. SAUNDERS. The statute is the Constitution, and the Constitution is the statute. The statute can not effect any change in the Constitution.

Mr. PARSONS. There has been no election case since the enactment.

Mr. SAUNDERS. That makes me out a falsifier, I am afraid.

Mr. PARSONS. Oh, I did not mean to be offensive.

Mr. SAUNDERS. Of course, I merely said that in jest.

Mr. CARRICO. It has never been before the court of appeals.

Mr. SAUNDERS. No; that is not the question that was asked me.

Mr. NELSON. I want to ask you what I asked Mr. Carrico yesterday. I want to get at the practice. Do you know what the practice has been with reference to this?

Mr. SAUNDERS. He answered that. Some of the judges of election hold one way and some the other. Some of the judges, Democrats and Republicans, hold that the list is conclusive, and if you are not on the list you can not vote. At some of the precincts in Grayson the judges ruled that the list was exclusive evidence, while the judges at other precincts ruled that it was not essential to be on the list and that if the voter's taxes had been paid, as prescribed, he could vote. So far as I am aware, the general rule in Virginia is that if a man has paid his taxes in time he is permitted to vote.

Mr. NELSON. In other words, it is an unsettled question?

Mr. SAUNDERS. Yes.

Mr. CARRICO. You are speaking of judges of election?

Mr. SAUNDERS. Yes.

Mr. CARRICO. There are no Republican judges, of course?

Mr. SAUNDERS. I suppose it is another case of wrongdoing, that we have elected Democratic judges. [Laughter.]

Mr. CARRICO. The judge of our court holds one way and the judges you speak of hold differently.

Mr. SAUNDERS. I do not know; has it ever been before him?

Mr. CARRICO. Yes.

The CHAIRMAN. I would like to have decisions cited.

Mr. SAUNDERS. I will cite them. All this is a digression from the chain of my argument.

To come back to the section of contestant's brief, from which I was quoting, I will read the following:

> There was gross neglect and violation of duty on the part of those officers who were required to prepare and present for the use of the election boards the poll-tax lists as required by law.

I challenge these gentlemen, in that connection, to produce the evidence of any gross neglect or violation of law with reference to the preparation of this poll-tax list on the part of any Democratic officials. I will show the committee by the testimony of a Republican judge in Carroll County—a strong Republican county, by the way—that the judges at one precinct had a list for use on election day, with pencil emendations thereon, that were not present on the certified list of the treasurer when that certified list was exhibited to the witness on the stand. That is the testimony of a Republican.

Mr. KORBLY. How many names, do you remember?

Mr. SAUNDERS. Quite a number of them. One of the names he testified was on the back of the list, written there in pencil.

Mr. CARRICO. That was a list certified out by the clerk of the court as a voting list.

Mr. SAUNDERS. No, sir; he testified to this effect; that the list they used on election day had pencil emendations in the columns and he did not know where they came from; also pencil emendations on the back of the list. He was confronted with a certified list from the clerk of that county, and he said, "This is not the list I had on election day." The question is, where did those pencil additions come from?

The CHAIRMAN. What witness was that?

Mr. SAUNDERS. That was Mr. Byrd, at Sulphur Springs. (See Rec., Byrd, pp. 517–18.)

Mr. NELSON. I suggest the judge follow his argument.

Mr. SAUNDERS. I do not object at all to questions.

The CHAIRMAN. What witness?

Mr. SAUNDERS. I will give you the witness; I have the reference here. Look on page 518 of the testimony of Mr. Byrd, Republican judge, pages 517 and 518. In the middle of page 517 you will see this:

Q. I here hand you a certified tax list containing the names of the electors certified by the treasurer of Carroll County to the clerk containing the names of the electors who had paid their taxes for three years prior to the 3d day of May, 1908, and were entitled to vote. Examine that list and see if you find on there the name of H. M. Jones.—A. Well, I looked for it a while ago, but I don't find it. I don't know, but I think I ought to have the list that we used over there, because there was some names wrote on that list. My reply is that it wasn't on this list.

Q. Were the names written on it?—A. Yes, sir; in a pencil.

Further, in that connection, you will see that on the back of that list was a name added in pencil. That is a most extraordinary way, I will say, for a clerk of a court to correct a record pursuant to an order of court. The clerk does not go on the stand to prove that these emendations or additions were court additions proper to be made by him.

Mr. CARRICO. Let me ask you this question: The clerk certifies those lists out and they go out with the ballots for the judges to be guided by in the voting at that precinct, although not as the certified list.

Mr. SAUNDERS. Yes, they go out, but possibly in that county, as in the county of Grayson, the treasurer on the night before, was figuring over the lists, and adding names in pencil, or in red ink.

Mr. NELSON. I understood from your contention that the treasurer's list is the original of the poll-tax list, and then it goes to the clerk of the court?

Mr. SAUNDERS. Yes.

Mr. NELSON. How could the treasurer have put those names on after the clerk had it?

Mr. SAUNDERS. Only improperly.

Mr. NELSON. How does he get the list?

Mr. SAUNDERS. He has no authority whatever to get the list.

Mr. NELSON. I understood he had nothing more to do with it.

Mr. SAUNDERS. Officially, certainly not. On page 518, you will find this testimony:

Q. Examine said tax list and see if you find the name of W. M. Vaughan thereon.—A. No, sir; I don't think it is here. I will see. No, sir; it is not on here.

Q. Any of these men that you have mentioned written on the back of the list?—A. I could not tell you where they were written; all through the book. Some were written on the back of the book.

Do you suppose that any clerk bearing in mind the regularity that goes with court proceedings would have added these names in this slipshod and extraordinary manner? If these names were added pursuant to court orders, the fact could have been easily established. Do you think the names would have been added to the list in any such irregular manner as that by a clerk of court—some in pencil, and some written on the back of the document?

Mr. NELSON. Your objection is that they were in red ink, in pencil, and on the back?

Mr. SAUNDERS. My contention is that these were not the additions authorized by law, whether in pencil or red ink.

Mr. NELSON. What are the facts that lead you to make that statement?

Mr. SAUNDERS. The facts are the statements of the witness Byrd, from whose evidence I am reading. This man is a Republican, and was a judge of election at Sulphur Springs, where I received 4 votes. He was shown a certified list from the clerk that did not contain these pencil additions. I submit that the proof as to these additions puts the whole list at this precinct under suspicion, and suggests that in other precincts the lists had been improperly padded.

Mr. CARRICO. Let me ask you this: In the county of Carroll, the clerk was placed on the witness stand by the contestee, and the orders of the court are a matter of record, are they not?

Mr. SAUNDERS. Certainly.

Mr. CARRICO. And would it not have been easy to have shown that these parties were not placed on there by the court—by the clerk?

Mr. SAUNDERS. When the clerk was put on the stand, don't you think the contestant ought to have been the one to furnish his own evidence and to clear up his own case, when that case was under suspicion? There is more of that deposition. I expect to touch on that later.

Mr. TOU VELLE. The clerk sent out a certified copy of the names and the additions?

Mr. SAUNDERS. Yes.

Mr. TOU VELLE. And you handed to the clerk a certified copy and he identified that?

Mr. SAUNDERS. No; the judge of election, the very judge who had used the list for purposes of voting at this precinct was presented with a certified list, and he stated that these pencil additions were not on the list shown him but were on the list he used at the election.

Mr. BENNET. As I understand, this clerk of Carroll County was called as a witness and neither side asked him any questions about these emendations or additions?

Mr. SAUNDERS. So far as I recollect, they did not; that is true, but, as I stated a moment ago, when that list was under suspicion, by reason of the evidence in this record, to which I have called your attention, was it not the duty of the contestant to undertake to remove these injurious suspicions and to show that these additions were regular and made by order of court?

Mr. NELSON. I want to get at what you base this on. This judge of election testified, as you claim——

Mr. SAUNDERS. Here it is.

Mr. NELSON (continuing). That when he first saw the list it contained a certain number of names, and afterwards he claimed they were not the same names; that there had been names added?

Mr. SAUNDERS. Yes; these names were not on the list that was handed to him when on the stand.

Mr. BENNET. Oh, no. As I understand it, the list that was shown him on the day he testified is not the list he used at all; it is just a certified copy.

Mr. SAUNDERS. That is what I say. It was a certified list, and the other list was a certified list, and the two ought to be identical unless there had been some court additions to the treasurer's list.

Mr. NELSON. That is what I had in mind.

Mr. BENNET. But his contention is that the certified list he had on election day was different.

Mr. SAUNDERS. It was different; he swears it is different.

Mr. BENNET. There is no contention that the two lists were the same lists at all.

Mr. SAUNDERS. Yes; the lists ought to have been the same, unless there were some court additions. They both purported to be copies of the treasurer's lists.

Mr. BENNET. But not physically the same papers?

Mr. SAUNDERS. Oh, no.

Mr. KORBLY. In other words, the one that had the pencil emendations on it was not before the witness?

Mr. SAUNDERS. No. In connection with the Grayson County you will find on page 323—I suppose the gentlemen object to this evidence as hearsay.

Mr. BENNET. Before you go into that, what should have become of the certified copy of the tax-paid list that the judges of election had?

Mr. SAUNDERS. I do not know of any law providing for its preservation.

Mr. BENNET. It just disappeared after election day.

Mr. SAUNDERS. What I mean to say is that there is no provision for keeping that list. The original record is in the clerk's office. A man ought to be able to go to the clerk's office and at any time secure a copy which would be exactly the same list as the one used by the judges, because there can be no proper list, save the clerk's copy of the treasurer's list, with such additions as have been ordered by court.

Mr. BENNET. We have a provision in our law that all such lists of voters that are sent out to the election officers, must be returned to the county clerk. I thought maybe you had something of that kind.

Mr. CARRICO. No, sir; they are never returned.

Mr. SAUNDERS. The evidence I am now reading may be objected to as hearsay. Contestant objects to it on that ground, but the circumstances all tend to show that it correctly gives the facts. You will find on page 323 of the record that a man named Cornett had a conversation with a man named Sells, a day or two prior to the election. Sells, who was a Republican, and a supporter of contestant, made this statement to Cornett:

> Andy Sells told me he came to town with Bob Catron and saw Busic, the treasurer, put Bob Catron's name on the list; that he either put down John W. Hall's, and Steve Fielder's names on the list, or put some of the years for which they should have paid tax; at least, he fixed their names on the list, so they would be enabled to vote the next day.

The only way in which these gentlemen can escape the force of this testimony is to say it is hearsay. It is hearsay, but it is hearsay under such circumstances that it compels conviction, because this treasurer was directly put under suspicion by the statement, and yet neither the treasurer, nor Mr. Sells, nor Bob Catron, went on the witness stand to vindicate themselves.

Mr. CARRICO. Was not Sells summoned as a witness by the contestee there?

Mr. SAUNDERS. And you had a chance to put him on the stand.

Mr. CARRICO. And after the attorneys consulted with him, they refused to put him on the stand?

Mr. SAUNDERS. The lawyers on this committee can decide for themselves how much you can generally accomplish for your case by putting an adverse witness on the stand. Sells evidently did not know, when talking with Cornett, that Busic had done anything illegal in adding the names to the list. It seems to have been a common practice in that county. Sells was a strong supporter of contestant, and both he, Catron, and Busic, the treasurer, were Republicans. Sells stated that he and Bob Catron went to town the night before the election and that he saw the treasurer, a Republican, add names to the list. Cornett comes on the stand and swears to these facts and Sells is never called to contradict him nor is the treasurer of the county put on the stand. Do you suppose an official, put under suspicion by evidence of that character, if conscious of rectitude, would not be eager to go on the stand and brand those statements as false?

Mr. THURSTON. I would naturally conclude if you had Sells——

Mr. SAUNDERS. You had him, and the reason we did not put him on was that you had him.

Mr. CARRICO. He was summoned.

Mr. SAUNDERS. Yes; and after counsel talked with him they found that they could not put him on the stand. You never bothered to take him up after we declined to examine him.

Mr. THURSTON. I should assume you found out he would not confirm that statement.

Mr. SAUNDERS. And I would assume that you found out that he would not refute it, which is more to the point, because he was a witness of your faith and your supporter, or rather your client's supporter. This committee is composed of lawyers. They can determine upon the evidence whether the presumption is that Sells was telling the truth in the first instance, when he made that statement, or whether any injurious conclusion is to be drawn from the fact that we did not put him on the stand.

The CHAIRMAN. What difference does it make whether this fellow is telling the truth or not?

Mr. SAUNDERS. Can it be said that it was not to contestee's prejudice for the treasurer to add voters to the tax list on the night before the election, bearing in mind the conclusive effect that is imputed to the list?

The CHAIRMAN. How do we know it was done illegally?

Mr. SAUNDERS. He could not do it on the night before election, or at any other time after he sent the list to the clerk, except illegally, after the treasurer passed on his list to the county clerk five months before the election; he had no legal right thereafter to make

any additions to the list. Any additions on his part were illegal additions. So much for that. These gentlemen admit in their notice that the treasurer can not add to the list.

Mr. HOWELL. I can not understand how this list in the hands of the clerk could get to the hands of the treasurer.

Mr. SAUNDERS. The evidence shows it got there, because names were added in red ink the night before, and the list turned up next day at Comers Rock, with the red ink emendations to show for themselves. Of course the treasurer's possession, for the purposes indicated, was an illegal possession.

Mr. NELSON. Would not that imply collusion between the clerk and the treasurer?

Mr. SAUNDERS. I think that is a fair inference.

Mr. CARRICO. Were not those red-ink emendations all over the county?

Mr. SAUNDERS. Yes. That is the reason I connect the other red-ink emendations with the treasurer and not with the clerk.

Mr. CARRICO. Suppose the court had ordered names to be placed on there; the list had been misprinted, and posted. How would he place them on there?

Mr. SAUNDERS. I will tell you how I presume he would do in your county. He would certify the treasurer's list, and then he would make a separate list thereon, setting forth that the following names were added by virtue of order of the circuit court, or else he would add the names alphabetically and append a certificate stating the names that had been included in the court order.

Mr. CARRICO. Suppose he added the names alphabetically along under there in ink, would not that be as legal?

Mr. SAUNDERS. I would not say that would not be legal.

Mr. CARRICO. Is there any law to the contrary?

Mr. SAUNDERS. I would say that it was, but it is very unusual for a man who is adding to a list by virtue of a court order not to set forth the authority by which the names are added.

The CHAIRMAN. I want to read just what this man says:

A. Yes, sir; Andy Sells; Andy Sells told me he came to town with Bob and saw Mr. Busic, the treasurer, put Bob Catron's name on the list; that he either put down John W. Hall's and Steve Fielder's names on the list or—

He does not know whether he put them on or not.

Mr. SAUNDERS. It does not make any difference as to legality whether he put on names, or added years to existing names, so as to show them fully paid up.

The CHAIRMAN [continuing reading]:

Or put some of the years for which they should have paid tax; at least, he fixed their names on the list, so they would be enabled to vote the next day.

Mr. SAUNDERS. So they could vote.

The CHAIRMAN. How does he know whether he fixed them, when he does not know whether he put on the names or not?

Mr. SAUNDERS. I could tell you very readily.

The CHAIRMAN. How?

Mr. SAUNDERS. If the treasurer was working on this record and the witness was standing at a short distance, he might not know whether the treasurer was writing names in or adding years, but he could see that he was making additions, and all additions were illegal.

The CHAIRMAN. He says he does not know whether he put the names on at all.

Mr. SAUNDERS. Well that may be so, but I do not look at it in that way, at least it does not seem to me that it makes any difference whether he saw him adding names or years, both were illegal.

The CHAIRMAN. That is just exactly the way I look at it, that he does not know whether he put the names on at all.

Mr. SAUNDERS. He says he fixed them so that they would be able to vote. At any rate Sells says he saw Busic add Catron's name, whatever may be thought of his statement as to the others.

The CHAIRMAN. He says he does not know whether he put the names on or not.

Mr. SAUNDERS. The next day the list turned up with those names on it. The witness says that Busic fixed them, and they were fixed all right.

The CHAIRMAN. I am giving him the benefit of the doubt. He says he doesn't know.

Mr. NELSON. In other words, the treasurer did not have any right to have the book at all at that time?

Mr. SAUNDERS. None at all.

Mr. CARRICO. I want to ask if the record does not show that there were Democrats who were on the list in these red-ink emendations who voted?

Mr. SAUNDERS. That is true; there may have been some; but does that affect the irregularity of the treasurer's conduct?

Mr. CARRICO. I do not see that the treasurer had any irregularity in his conduct, and I do not think the record shows it.

Mr. SAUNDERS. There is no evidence in this case that anyone else made emendations.

Mr. CARRICO. I do not think there is any evidence that he added any.

Mr. SAUNDERS. I submit that evidence now, and later I will submit more evidence as to these additions. I was asked by a gentleman on the committee what business did Busic have with this list on the night before election. I answer that he had no more right to add to this list than you or I or any other unauthorized person.

Mr. CARRICO. I want to ask you if, at the same time, at this same precinct, the Democrats who were on the list in these red-ink emendations were not allowed to vote by the two Democratic judges, and these same parties you speak of, the Republicans, were refused a vote?

Mr. SAUNDERS. I will say this, that Mr. Cornett testified he challenged all these red-ink emendations, and that his challenges were not allowed in many cases of Republicans whom he challenged. Possibly some Democrats may have voted who had been added by Busic. I believe the record in this case shows that one did vote; but I am talking now not about the irregularity of the votes, but about the misconduct of this treasurer in adding to the tax lists when he had no right to do so, either on the night before the election or at any time after he lodged them with the clerk.

(Thereupon, at 12.15 o'clock p. m., a recess was taken until 8 o'clock p. m.)

NIGHT SESSION.

The committee met, pursuant to the taking of recess, at 8 o'clock p. m., Hon. James M. Miller in the chair.

ARGUMENT OF HON. E. W. SAUNDERS, CONTESTEE—Continued.

Mr. SAUNDERS. There are one or two matters which came up this morning to which I wish to refer while they are fresh in the minds of the committee. These matters did not come up in the order in which I intended to present them, but now that they are before the committee I will try to dispose of them.

First, in respect to a suggestion made by Senator Thurston touching the qualifications of election judges. As an offhand proposition, having reference to the fact that I have never considered an election judge as an officer in the technical sense contemplated by the laws of Virginia, I replied to Senator Thurston that I did not think that section 32 of the constitution applied to judges of election. But on thinking the matter over, I am disposed to think that there is more in that suggestion than I was disposed to accord to it at first. Certainly if a judge of an election is an officer, section 32 applies, and if it does apply, then this result follows: That while this section would make T. M. Smith, the judge at Design, ineligible, it would remove the ineligibility of two other judges who are attacked at Riceville and Bachelor's Hall. That result comes about in this way: These judges are attacked on the ground that they are, respectively, a constable and a justice of the peace. If the provision of the constitution which provides that every man who is entitled to vote is qualified to hold office is regarded as fixing the qualifications of judges of election, then the disqualifications intended to be imposed upon judges of election by section 118 of the code are unconstitutional. The specification of disqualifications in the constitution is an implied prohibition upon the legislature to add disqualifications of a further and different character. In this connection I want to cite the following decision of our supreme court [reading]:

> The act of February 14, 1884, prescribing that members of election boards shall be freeholders contravenes the Virginia constitution, Article III, section 2, which declares that "all persons entitled to vote shall be eligible to any office within the gift of the people," and is void.

In that case certain qualifications had been added by statute, as a prerequisite to holding a certain office, and on application to the supreme court they were held to be void. Further in the case the court uses this language (see p. —):

> Now, it is a well-established rule of construction as laid down by an eminent writer, that when the constitution defines the qualifications for office, the specification is an implied prohibition against legislative interference to change or add to the qualifications thus defined.

So that if Senator Thurston is correct—and I am free to say, after reflection, that I am disposed to think he is—and these judges of election are officers, then section 32 disqualifies T. M. Smith, if it is ascertained that he had not paid his taxes. But the officers at Bachelor's Hall and Riceville, who were disqualified by section 118 of the code, are not disqualified, as that section is rendered unconstitutional by the provisions of the constitution, establishing the qualifications of officers, as found in section 32 of that instrument.

Another word in connection with two matters to which your attention was called this morning. It was stated that in the county of Grayson the evidence showed that the treasurer had been adding to the tax lists of that county. I cited a portion of Cornett's evidence at the time. In that connection I now wish to cite another portion of his testimony which will conclusively show that the treasurer of that county did, as a matter of fact, undertake to add to those lists.

I wish to refer the committee, in addition to what I have already cited, to page 322 of the record. The citations of this morning referred to the conversation of Cornett with a man named Sells. But the next citation will come a little closer to the treasurer. The same witness, Cornett, testifies to a conversation with one P. K. Catron.

The CHAIRMAN. What page is that?

Mr. SAUNDERS. Page 322 of the record.

Under the law of Virginia, before an election, there is sent to one of the judges of election, by the clerk, the poll books and the certified tax list, for use at that election. Now, the words "certified list" are used in section 38 of the constitution with respect to the tax list, after it is sent out by the clerk for official use by the judges of election at a precinct. Here is the matter to which I wish to call your attention in this connection. [Reading:]

The evening before the election I took the registration book for Comers Rock precinct to P. K. Catron, and left it with him, as one of the judges of election. I asked him if he had a list of those who had paid their poll tax for Comers Rock precinct; he said it had been sent to him with the poll books, and he found, on examining it, that his son Bob's name had been left off, and he had sent it back to town, to have it revised or fixed. That he sent it by Bob.

Bob is the same man whose vote was subsequently contested, and here we find the judge of election stating to this witness, Cornett, that he had sent the tax list to Independence by his son Bob, to have it revised, or fixed. Bob Catron was the man who went with Sells to the town of Independence.

After this man Cornett testified to the foregoing conversation, P. K. Catron went on the stand, and did not undertake to deny that it had taken place, as asserted by the witness.

So I think that this evidence, in connection with the other citation, establishes the fact that the treasurer of that county was adding to the tax lists on the night before the election.

I stated to-day that so far as contestant was concerned he had asserted in his notice and his brief that no name could be added to the list save by order of the court; that neither the treasurer nor anyone else had the right to add to this list, after it passed out of the treasurer's hands, save the clerk, pursuant to an order of the court.

I want to call attention, in connection with that statement, to the following extract from the brief. On page 26 of this document you will find the following:

No election board can disregard this tax list. No matter how incorrect or incomplete it may be, no additional names can be placed upon it except by an order of the circuit court or a judge thereof.

As I said, I accept that as a sound proposition of law.

Mr. CARRICO. Suppose the circuit court in its order had ordered that Bob Catron's name go on the list and through inadvertence the clerk had not placed it on there when he had certified it out to the judges of election; would it have been proper, the day before election, for him to have placed it there?

Mr. SAUNDERS. I think so; yes. He could have placed it on there at any time. But there is not a line of evidence here to show that the list was sent to the clerk. It was sent to the treasurer, not the clerk. If you can connect the clerk with these additions, I haven't a word to say in the way of criticism or objection. On pages 310, 311, and 312 of the record will be found the testimony of Mack Pugh. This testimony refers to the red-ink annotations. Mack Pugh swore that he had not paid his taxes for 1905, 1906, and 1907. He was on the list all right. He voted for the contestant.

Then there is Hoffman, at page 280 of the record——

Mr. CARRICO. Didn't he also say that a Democrat had paid them for him?

Mr. SAUNDERS. I don't find anything of that kind. You tried on cross-examination to get him to say something like that, but you could not get him to do it. He didn't know who paid them. But if a Democrat paid them, a Democrat didn't get his vote. I will read from his testimony. [Reading from p. 310 of the record:]

Q. Please state whether you paid your poll tax for the years 1905, 1906, and 1907, as required by law.

A. No, sir.

Q. I here hand you what purports to be a list of voters in Grayson County, who had paid their poll tax for the years named, which said list is sworn to by D. J. Busic, treasurer of Grayson County. Now please take this list and look on page 6 of the Wilson district and see if you do not find the name of Mack Pugh written in red ink, and after the name the figures 1905, 1906, and 1907, showing that you had paid your poll tax for those years.

A. Yes, sir; it looks to be there.

And later he swears he voted for contestant. Having proved that the treasurer added to the Comers Rock list with red ink, and having proved further (see Analysis, pp. 24–25) that other additions in red ink were made to other lists at the different precincts, it is submitted that the treasurer is connected with all the red-ink emendations, and the whole list for this county, which went largely Republican, is put under suspicion. In addition the record shows that various people went to Busic after May 1, 1908, to have their names entered on the list.

So much for that. I pass on now to what I am sure will be far more interesting matter to the committee, and certainly to me, than the matters I have been dealing with up to the present time. I desire to take up the propositions of law that were presented by Mr. Carrico and Mr. Montague on yesterday, and to take them up in the reverse order. First, the arguments submitted by Mr. Montague, so far as they relate to the constitutionality of the Virginia act of apportionment. I shall undertake, to the best of my ability, to demonstrate the constitutionality of that act, whether with reference to the Constitution of the United States or to the constitution of Virginia.

Mr. Montague said that this was purely a federal proposition. In that statement he was obviously in error. When he vetoed the bill to which he referred in his argument he did not base his veto on the ground that the question presented was purely a federal proposition, because he related his message partly to the Constitution of the United States and partly to the constitution of Virginia. (See record, p. 225.)

With reference both to the constitution of Virginia and to the acts which derive their authority from the Constitution of the United

States, I shall undertake, as I say, to show that the Virginia statute is constitutional.

Mr. Montague walked very carefully when he discussed the constitutionality of the act of 1908, with reference to the constitution of Virginia. He denied one thing. He denied that we could derive the right of the State to make apportionments from section 4 of the Constitution, which provides that the times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof, subject to the controlling power of Congress acting under the Constitution. I might well ask Governor Montague, in that connection, if the right of the legislature to district a State does not proceed from that clause of the Constitution, then from what clause does it proceed?

That question was certainly not answered by him on yesterday. According to the uniform current of authority, section 4 is the one which affords the States the right to lay themselves off into districts. If Congress possesses a paramount authority in this respect, and the existence of this power has been often denied, it must be derived from the same section. This section is as follows:

> The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators.

Governor Montague made light of the proposition that this section furnished the authority to the States to enact their statutes of apportionment. If they do not derive this power from this section, is it an inherent and fundamental possession of their own? If they derive it from the Constitution, I submit that they must derive it from that clause of the Constitution. If they derive it from that clause of the Constitution, then the power is an absolute possession of the States until that power is, in some way, circumscribed by the authority of Congress.

To what extent has Congress undertaken to circumscribe the power of the States with relation to laying off their territory into districts, in respect to the details of contiguity and compactness? I know of no statutes to that end, no restriction in that respect, save the act of apportionment of 1901. Governor Montague did not seem disposed to attach much authority to this act, but if this statute does not prescribe a rule for the States in the matter of apportionments, then Congress has not sought to exercise its supposed authority in this respect.

The attention of the committee is directed to this act, because I wish to consider this matter primarily with reference to the power of Congress to interfere with the States in matters of apportionment.

The act referred to is as follows:

> In each State, under this apportionment, the number to which such State may be entitled in the Fifty-eighth and each subsequent Congress shall be elected by districts composed of contiguous and compact territory, containing, as nearly as practicable, an equal number of inhabitants.

That, as I said, is the only act of Congress of which I have any cognizance, or to which anybody has undertaken to refer, which undertakes to say to the States how they shall lay off their districts in the particulars mentioned, namely, of contiguity and of compact-

ness. Are there any authorities on this proposition? I call upon these gentlemen in this connection to point them out.

In this connection, Governor Montague failed to advert to an authority immediately in point, an authority which is precisely on all fours with this case, an authority which, until it is set aside, is absolutely conclusive and decisive of the case in hand. Its findings are, first, that the Congress has no authority over the States in the matter of apportionments, and, second, that if the Congress possessed this power, it would be most unwise and inexpedient to undertake to exercise it. The case to which I refer is that of Davidson *v.* Gilbert, which grew out of the action of the Kentucky legislature in taking a county from the Eighth Kentucky District and adding it to another. By reference to that case it will be seen that the State of Kentucky took this action by virtue of its legislative authority. It took a Republican county from one district and put it into another district. And when it took that Republican county from the one district and transferred it to the other district, it made the first district Democratic. Before that time the district was Republican. As a result of the change it became Democratic. Of course that was an outrage. I believe Mr. Speaker Reed used to say each time the Committee on Rules reported a special rule, "Prepare for another outrage." The action of the legislature of Kentucky was another outrage. Now, what happened in that district when a Democrat was elected in consequence of the change? The Republican who was defeated brought his case to Congress, and set up the claim that the State of Kentucky, in respect to this act, had gerrymandered his district, and that this action was wrong; that it had been done for political purposes; and that no sufficient reason could be afforded why this change should have been made, and the pivotal county transferred from one district to another; in other words, that the action taken was wrong per se—morally wrong, as well as in excess of the constitutional authority vested in the State of Kentucky. Well, that case was sent to a committee. I think it went before this very committee; possibly the chairman of this committee was a member of the committee at that time.

The CHAIRMAN. I think that was Mr. Mann's committee.

Mr. SAUNDERS. Well, Mr. Taylor was a member of the committee. This gentleman seems to have been a man of remarkable ability. I have examined his arguments in connection with various matters before the House; I have followed the course of his arguments in connection with the Brigham Roberts case, and later in connection with the Smoot case, in the Senate of the United States; and without regard to the universal opinion which is entertained of his ability, those deliverances on his part would be sufficient to establish him as a sound constitutional lawyer and a man of great learning. He made the report in the case I have referred to, and I will not undertake to present its findings in my own language. The most effective way of presenting this report to the committee will be to read such portions of it as touch on the case in hand.

This case of Davidson *v.* Gilbert will be found in Hinds Precedents, volume 1, on pages 180–181. Now for the citations: The third objection was that this act contravened an act of Congress. The committee considered at length in the light of Article I, section 4, of the Constitution, the suggestion that the Kentucky act

contravened the federal act of apportionment. Section 4, of the Constitution, is as follows:

The time, places, and manner of holding election for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may, at any time, by law make or alter such regulations, except as to the places of choosing Senators.

The report proceeds to say that this was the first time that Congress had been asked to undo the work of a State which had divided itself into a proper number of congressional districts. Reviewing the history of apportionment the report adds:

The CHAIRMAN. Did he say that was the first time?

Mr. SAUNDERS. That is what Hinds says, quoting from the report.

Mr. THURSTON. Tayler said that in his report.

Mr. SAUNDERS (reading):

For nearly forty years the States proceeded to elect representatives, some at large and some by districts. In 1840 the policy of electing by districts was generally approved and adopted, but several of the States continued to elect their representatives by the vote of the entire State. The first legislation on the subject going beyond the mere apportionment of the States was enacted in 1842. In the apportionment act of that year an amendment was added in the House providing for the division of the several States into districts, composed of contiguous territory, equal in number to the number of representatives to which the State was entitled, and each district to elect one representative and no more.

The amendment provoked considerable discussion, but was finally adopted.

Then came the apportionment act, and there was finally added to it the provision requiring an equal number of inhabitants in the districts, so far as practicable. On this apportionment act a part of the contestant's case is based, as set out both in his notice and in the brief filed on his behalf. In both of these papers it is asserted that when the State of Virginia created the fifth district, under the act of 1908, its action was unconstitutional, in that it failed to conform to the federal statute in respect to its requirements as to compactness and population. So much for the claims of contestant in the present case. Now for the findings of the committee.

I want to say another thing in this connection, and that is that it has never been authoritatively settled that Congress possesses the authority to require the States to elect by districts. Of course I won't go into that to-night. The report in Davidson *v.* Gilbert proceeds as follows:

So far as legislative declaration is concerned, it is apparent that Congress has expressed an opinion in favor of its power to require that the States shall be divided into districts composed of contiguous territory and of as nearly equal population as practicable. Whether it has a constitutional right to enact legislation is a very serious question, and the uniform current of opinion is that if it has such power under the Constitution, that power ought never to be exercised to the extent of declaring a right to divide the State into congressional districts or to supervise or change any districting which the States may provide.

The best opinion seems to be that the Constitution does not mean that under all circumstances Congress shall have power to divide the States into districts, but only that the constitutional provision was inserted for the purpose of giving Congress the power to provide the means, whereby a State should be represented in Congress when the State itself, for some reason, had failed or refused to make such provision itself.

One of the grounds of the pending contest is that the Virginia statute of 1908 transferring Floyd from the fifth to the sixth district is in contravention of the alleged authority of the federal act of apportionment cited supra. In this connection the ultimate finding of

the report in Davidson *v.* Gilbert will be of interest to the committee. This finding is in the following terms:

> Your committee are therefore of opinion that a proper construction of the Constitution does not warrant the conclusion that by that instrument Congress is clothed with power to determine the boundaries of congressional districts or to revise the acts of a state legislature in fixing such boundaries, and your committee is further of opinion that even if such power is to be implied from the language of the Constitution, it would be in the last degree unwise and intolerable that it should exercise it.

To do so would be to put in the hands of Congress the ability to disfranchise in effect a large body of electors. It would give Congress the power to apply to all the States, in favor of one party, a general system of gerrymandering. It is true that the same method is resorted to in a large degree by the several States, but the division of political power is so general and diverse that notwithstanding the inherent vice of the system of gerrymandering some kind of equality of distribution results.

This case is authority for two propositions: First, that Congress has no constitutional power to determine the boundaries of congressional districts, or to revise the acts of a state legislature in fixing such boundaries; second, that if it possessed this authority its exercise would be most intolerable and unwise.

Mr. NELSON. Might I interrupt you right there?

Mr. SAUNDERS. Certainly.

Mr. NELSON. I have read that case, and I would like to have you suggest to me, if you have given the thing any thought, how that could be done without a law being made by Congress?

Mr. SAUNDERS. I do not see how it can be done.

Mr. NELSON. In that case, it would have to be applied to all the States in the Union?

Mr. SAUNDERS. Certainly. This suggestion shows what a Pandora's box is opened when you undertake to do what this contestant asks you to do in order that he may acquire my seat.

Mr. NELSON. Follow that up, please. Say we in this case attempt to apportion——

Mr. SAUNDERS. You are asked to set aside a valid act of apportionment in the State of Virginia.

Mr. NELSON. But are we attempting to legislate at all?

Mr. SAUNDERS. Well, of course you are not undertaking to prescribe a specific district, but you are undertaking to set aside a valid act of the legislature which has established our districts. To do this successively would be to legislate, in substance. The analogy is the action of the courts in those States where they undertake to say that some specific arrangement of legislative districts is unconstitutional. In those States the courts can avoid successive acts of apportionment until finally one is presented which they are willing to approve. This, in substance, is apportionment making by the courts.

Mr. NELSON. If it does not interrupt you, I would like to ask another question?

Mr. SAUNDERS. It does not interrupt me at all.

Mr. NELSON. I want to ask you for light on these points that are troublesome. In the exercise of our jurisdiction here, what is to prevent our declaring that law valid or invalid on the provision which gives us a right to look into the election returns of Members of Congress.

Mr. SAUNDERS. Well, the election and return of a Member is valid if it conforms to existing law. If it is alleged to be invalid, that invalidity must be referred to some proper ground. The election of a Member can not be declared invalid as a mere exercise of arbitrary power. Now, the report in the case supra holds that the act of apportionment of 1901 does not furnish Congress with the power to interfere with the States in the matter of laying off districts, and holds further that, even if it did, the power ought not to be exercised. If this House can say: "This arrangement does not suit me; it does not conform to my notion of what a proper district ought to be, and I will declare the same invalid and unconstitutional," then what will happen? Suppose the State makes another arrangement and another election is held, but another contest is instituted presenting the same question. The House may again declare its authority, and pronounce the second act unconstitutional. Thus, by virtue of declaring successive acts of apportionment invalid, the House would, in substance, compel the rearrangement of every district in that or any other State, in conformity with its own views. This would be for the House alone to practice a general system of gerrymandering.

You are asked to do in this case just what was asked to be done in the case of Davidson *v.* Gilbert. It was claimed in that case that a county was improperly transferred from one district to another; that such a wrong ought not to be allowed, and that the Republican contestant of Gilbert's seat ought to be seated as a sort of punishment of the State of Kentucky for its improper practices.

Mr. THURSTON. If I do not interfere with you——

Mr. SAUNDERS. Not at all.

Mr. THURSTON. Referring to this particular case, not what Mr. Tayler says there, but take this case before us. If this committee should declare your act changing the boundaries of the fifth and sixth districts unconstitutional, Congress would not thereby be defining any districts from which Congressmen should be elected, but would throw the elections back into the districts fixed by your own State at a time and in a way that was clearly legal.

Mr. SAUNDERS. That raises the question whether the other act was in anywise more legal than the act of 1908. Why was the "time" and "the way" of the act of 1906 more legal than the "time" and "the way" of the act of 1908?

Mr. THURSTON. That would not take the power away from the States.

Mr. SAUNDERS. Let us see. Looking to the map of Virginia, you will see that there are other districts in the State that lack compactness even more than the fifth district. The sixth is more of a shoestring district than the fifth. The gentleman who ran against Mr. Glass could therefore claim that the act that fixed the sixth district was invalid, and instituting a contest, could ask Congress to declare that the apportionment of 1906, so far as the sixth district was created thereby, was null and void. This course could be taken consentaneously or consecutively with reference to all the districts of the State. This would be, as I have said, to vest in the House an absolute control over the States in respect to the arrangement of their districts. This contestant asks this committee to recommend a policy which was deprecated by the report in Davidson *v.* Gilbert.

Mr. NELSON. Let me press that a little further, if I may.

Mr. SAUNDERS. Certainly.

Mr. NELSON. Supposing that that is carried on, supposing that this being done in Virginia and having been done in the Gilbert case, and we decided as they did in the Gilbert case, what is to hinder them shifting the territory every two years?

Mr. SAUNDERS. Nothing in the world. Should you decide that the House has the power to avoid the apportionment acts of the States, what would hinder it from exercising this power whenever it met, with reference to the acts of any and all of the States whose apportionments did not meet its approbation? A question of large policy is involved in contestant's application in this case.

Mr. NELSON. But you take away that right.

Mr. SAUNDERS. But if you claim that right (this, of course, is a sort of counter question), then I ask you, what would hinder the House, every time that it meets, from drawing into issue every district in the United States?

Mr. NELSON. It is the difficulty with it that you object to.

Mr. SAUNDERS. Yes; there is a practical difficulty that emphasizes the unwisdom of the suggested policy.

Mr. NELSON. You do not deny the constitutional right.

Mr. SAUNDERS. Well, on that point I think I might rest my case on the report of Mr. Tayler in Davidson *v.* Gilbert.

Mr. NELSON. I wanted to know on which you relied, the constitutional right or the policy?

Mr. SAUNDERS. On both. But I have not undertaken to argue that Congress has no right to establish or regulate the districts in the States. In that respect as well as in the other I stand on the findings of the report. Until the findings of that report are overruled, I think they will command as much respect, and for that matter a great deal more, than any argument I could make on the questions which it discusses. Of course, I have investigated the question of constitutionality, and could argue it, but I think that, until this committee reaches the point that it is disposed to say that, as a matter of wise policy, this House ought to undertake this enterprise of upsetting congressional apportionments, it is not necessary for me to do more than stand firmly on this well-reasoned precedent.

Mr. THURSTON. If I do not interrupt you——

Mr. SAUNDERS. Not at all.

Mr. THURSTON. You understand, of course, that that act of the Kentucky legislature was the first action taken in the way of changing the congressional districts.

Mr. SAUNDERS. Yes.

Mr. THURSTON. After a federal census?

Mr. SAUNDERS. Certainly.

Mr. THURSTON. It was the first act. They had not redistricted under the census until they passed that act.

Mr. SAUNDERS. I understand that.

Mr. THURSTON. Then there is one other thing here you do not find in this book; but you will find it in the full report of Mr. Tayler. He lays great stress in urging Congress not to act in this case on the fact that both political parties in the two districts affected had accepted the change, had held their nominating conventions with reference to the new districts, and had nominated as of the new districts, and had proceeded and carried out their elections in the new districts.

Mr. SAUNDERS. Well, with respect to the first suggestion, that is proper to be related to and discussed under another head, namely, the exhaustion of power by one act of apportionment. I will discuss that later.

Mr. THURSTON. That is right.

Mr. SAUNDERS. As to your second proposition I think the answer I have given in that connection in my brief is as good an answer as I can give; that if this question is a question of constitutionality, no act of a political organization can make that valid, which was once void. If the Kentucky legislature did not have the power to make the transfer then no subsequent action of a political organization could make valid that which was void in its inception.

Now, with respect to the question of policy, that committee did not say in its report that quo ad that particular district; it advised the House not to interfere with the exercise by the State of the power of apportionment, but it recommended that it would be an unwise national policy for Congress to embark upon the practice of interference with the apportionments of the States. It did not limit its recommendations to the Kentucky case, or say, as the courts sometimes say: "We will decide this case this way, but our action in this case is not to be taken as a precedent."

Mr. KORBLY. Does Mr. Thurston want to be understood as saying that the fact that Kentucky exercised the power to district the first time, and violated the rule for compactness, that it might do that because it was the first exercise of the power of districting?

Mr. THURSTON. No; I wanted to call attention to that because of our further legal contention that the legislature can only act once under each apportionment. As Judge Saunders says, that comes under the head of another discussion.

Mr. SAUNDERS (reading from Hinds):

> It is true that the same method is, to a large degree, resorted to by the several States, but the division of political power is so general and diverse that, notwithstanding the inherent vice of the system of gerrymandering, some kind of equality of distribution results.

In other words, there is a sort of substantial equality worked out under the present system without any interference by Congress with the rights of the States.

Now, a word further in this connection. Governor Montague referred to political precedents, and heaped contempt on precedents of this character. In respect to the case of Perkins *v.* Morrison, he criticised that as a political precedent. By the logic of this argument the decision of the committee in this case would be a political precedent and not entitled to be regarded as authority.

I want to say, Mr. Chairman, that that sort of argument proves too much. If we can not believe that the judgment of the committees of a preceding Congress, and of the Members who composed it, acting under their oaths as judicial bodies—for the statute under which this action is taken—makes this committee a judicial body is entitled to respect, how can we argue that the findings of committees of a subsequent Congress are entitled to any greater respect?

The committees of other days were composed of men like ourselves, elected likewise from congressional districts, and bringing a sense of duty to their work, just as we claim for ourselves that we bring to the discharge of our duties a proper sense of patriotic responsibility.

We are not to suppose that our forefathers were less mindful of their duty, or less disposed to do justice, than the men of to-day.

The argument of Governor Montague, which would comprehend in one sweeping condemnation the action of all political bodies, branding them one and all as partisan, was a hasty and ill-advised utterance. I am reminded of the saying imputed to one of the characters of the Bible: "I said in my haste all men were liars." Of course he had to modify his maxim, for in its original form the apothegm included its maker. If the action of other committees is not to be followed because they constitute political precedents, to what class will the action of this committee belong? It, too, by anticipation, is pronounced to be partisan, by the force of the governor's argument.

Governor Montague's criticism of the precedents afforded by the action of the House in the past was rather unusual. As a rule we refer to the action of our forefathers as embodying the height of wisdom. Our patriotic forefathers are always brought into the limelight when it is desired to emphasize, as it were, the lack of patriotism of the modern-day politicians. I believe those men did their duty, and I believe this committee will do its duty, and in doing its duty this committee will give to the precedents of this House that weight to which they are entitled, as thoughtful findings of men who were seeking to do their duty.

So much for this phase of the case. As I have said, until the contestant can overbear the report in Davidson *v.* Gilbert, he is shut off from asserting the power of Congress to interfere with the States in the matter of apportionments. It is said that the report was never acted on in the House. I take it that this fact increases its authority. The contestant was impressed with its authority, or else was unable to bring it before the House, which doubtless recognized that a decision in the negative of contestant's claim was a foregone conclusion. There it stands, emphatic, direct, cogent, logical, and comprehensive. It fits this case like a glove, and so long as it stands unreversed, so long as this committee is unwilling to recommend to the House of Representatives the twofold proposition, first, that the House possesses the constitutional right to interfere with the States in the matter of apportionments, and, second, possessing this right, that it would be a wise policy to embark upon its exercise, so long will this case oppose an effectual barrier to the effort of contestant to deprive me of my seat in the Congress of the United States.

The next proposition that I wish to discuss is that this apportionment is unconstitutional from the view point of the constitution of Virginia. There are a number of cases relating to the authority of the courts to overturn apportionments on the ground that they are contrary to the organic law. Some courts maintain the authority, others deny it, when the legislature exercises any measure of discretion. I will not undertake to reconcile the views of the courts which have rendered these decisions. They are hopelessly irreconcilable. They are no more to be reconciled than Webster and Hayne on the Constitution could be reconciled. They represent opposing views of a fundamental principle, or rather present fundamental principles which are hopelessly and irreconcilably opposed. One line of decisions is loath to interfere with the exercise of legislative discretion as

applied to political apportionments. The other line feels no indisposition on that score, but is ready to overturn any consecutive number of legislative apportionments.

There are four courts in the United States of the highest authority, which have declared unequivocally that the legislatures of the States, acting under constitutions like the constitution of Virginia, are vested with a political discretion in the matter of apportionments with which they will not interfere unless the act complained of is of such an extreme character of injustice that it may be fairly described not as unwise or unfair or indiscreet or unjust, but as a nullity, as not being an apportionment at all. There is the fundamental line of cleavage between the apportionment cases.

The courts of the State of New York, of the State of Illinois, of the State of Ohio, and of the State of Virginia maintain the proposition that the laying off of a State into districts is a matter of political discretion that should be remitted to the legislatures subject to interference by the courts in certain indicated and extreme cases; that it is not a judicial function to undertake to discharge this particular line of public duty. And then there are the cases from Michigan, Wisconsin, and Indiana which maintain the other view, that the courts can constrain the legislative bodies to walk in the straight and narrow way which they prescribe. These cases are not to be reconciled or harmonized. There is no one fundamental coherent proposition for which all the cases stand, unless it is that the courts possess jurisdiction. As soon as they undertake to ascertain how that jurisdiction shall be exercised the divergence begins.

What does the supreme court of New York say in this connection? That is a great court. I don't know of any court whose decisions stand higher with the bar than the court of appeals of New York. The opinion in Carter *v.* Rice is so voluminous that I will not undertake to read all of it, but I will call your attention to a few pertinent paragraphs.

> The power to readjust the political divisions of a sovereignty, with reference to the representation of the inhabitants in the legislature rests, of course, in the first instance, in the people. The essential nature of the power is political, as distinguished from the legislative or judicial power. The power to review in the courts exists, when the people have so limited the exercise of the power to readjust the political divisions of the State, that the power thus limited has become, in the hands of the persons intrusted with it, one of ministerial nature only. (Carter *v.* Rice, 135 N. Y., 499–500.)

And there you approach the dividing line which separates these apportionment cases, some on the one side and some on the other. The court continues:

> The legislature, in this case, is intrusted with some discretion in the matter of apportionment. Is the court to interfere with such power whenever it thinks that the legislature might, in its exercise, possibly have come nearer to an equality, after complying with the special conditions mentioned in the Constitution? This would be to assert a power in the courts to supervise the use of the discretion given to the legislature, if such discretion were exercised in the slightest degree, after the constitutional mandate in regard to the county lines and county members, had been complied with. We do not believe in the necessity or propriety of any such rule. On the contrary, we think the courts have no power in such cases to review the exercise of discretion intrusted to the legislature by the constitution, unless it is plainly and grossly abused. The expression, "as nearly as may be," as used in the constitution with reference to this subject, does not mean as nearly as a mathematical process can be followed. It is a direction addressed to the legislature, in the way of a general statement of principles, upon which the apportionment shall, in good faith, be made. (Id., 501.)

Of course cases can be imagined in which the action of the legislature would be so gross a violation of the constitution that it would be easily seen that the organic law had been entirely lost sight of. This would be a plain and gross violation, in the sense contemplated by this, and the other courts maintaining this principle.

Mr. NELSON. Let me interrupt you there. What, in your judgment, would be such an apportionment, where the constitutional provisions had been lost sight of? Can you give me a specific illustration?

Mr. SAUNDERS. Yes; but in doing that, Mr. Nelson, I will answer you in the language of these courts, that it would have to be such a departure from the constitution that the courts could not merely say: "This is an unwise apportionment; this is an unfair apportionment," but would flatly affirm this is no apportionment at all.

Mr. NELSON. Well, what do you mean by that?

Mr. SAUNDERS. That is what the courts say.

Mr. NELSON. Language has a meaning. What would in Virginia be a "no apportionment?"

Mr. SAUNDERS. I take it that if the State of Virginia undertook to group all of the counties in such a manner that nine congressional districts would contain one county each, while the remaining counties were included in the tenth district, such an arrangement would be a gross violation of our constitution in the contemplation of Carter *v.* Rice, supra. Of course, there might be other arrangements not so bad as the one suggested that would still be gross violations of the constitution, as these terms are used by the courts. In such cases the courts would hold that there had been no apportionments at all. These suggestions are illustrative of what the courts mean by the terms used. But it is clear that the court which decided Carter and Rice, under a constitution closely resembling the Virginia constitution, would not hold the present act of apportionment in our State to be unconstitutional, for the simple reason that the recitals of Carter *v.* Rice show that the New York apportionment then under consideration was a far more outrageous gerrymander, if you choose so to describe it, than the Virginia act of 1908, which is now drawn in question.

The facts in Carter *v.* Rice give a line on what the court in that case thought was an apportionment that may have been unjust, in a moral sense, but was not unconstitutional.

Mr. THURSTON. Have you found any case where the courts have denied the power of the judiciary to set aside an act of the legislature in the matter of an apportionment?

Mr. SAUNDERS. No; they all maintain the power of the courts to interfere, but differ radically as to when that power ought to be exercised.

Mr. THURSTON. They all concede that the power does exist and that it depends on whether or not there has been a gross, apparent, flagrant violation of the constitutional provision.

Mr. SAUNDERS. Yes; but the cases follow that up by showing what they mean by the words gross, flagrant, and palpable; they mean a redistricting; that is no redistricting at all; that is a nullity. They all use that illustration.

Mr. NELSON. I have tried to follow that up in my mind and I get nothing by that cleavage, because if there is no apportionment at

all—for instance, in your judgment, if they let it stand under the old, there would be the old apportionment.

Mr. SAUNDERS. The illustration I gave furnishes, I think, a case in which it might fairly be said that there was no apportionment at all.

Mr. NELSON. You gave me an idea of what you think it means.

Mr. SAUNDERS. Yes; I may add that it might not have to be so bad as that in order for the courts to exercise their powers of annulment in States like New York, Illinois, Ohio, and Virginia. The court of the latter State has expressed this principle of noninterference in the very largest terms. Still, I do not believe, I am frank to say, that when you work out the principle asserted by the Virginia case there is any difference between the position maintained by our court and that held by the Illinois case, the New York case, and the Ohio case. Our court has simply expressed its indisposition to interfere with apportionment acts in more sweeping and universal terms by declaring that the "matter of apportionment is a matter of political discretion with which it has no concern."

That is the statement of a Virginia court, and we are considering in one phase of this case the constitution of Virginia as the same is expounded by the supreme court of that State. Hence for the just decision of this contest, the case of Wise *v.* Bigger (79 Va.) is the strongest case that could be brought before this committee.

The CHAIRMAN. Is that New York case the case of Carter *v.* Rice?

Mr. SAUNDERS. Yes.

The CHAIRMAN. What do you say as to the later decision in New York?

Mr. SAUNDERS. That decision is the strongest confirmation of the proposition affirmed in Carter *v.* Rice that you could imagine, because so far from the court saying that Carter *v.* Rice was improperly decided, it expressly says that it recognizes the force and binding authority of Carter *v.* Rice, as conditions then existed. The later case was decided upon the terms of a constitution subsequent to Carter *v.* Rice.

Now, I wish to say another thing in this connection. Our friend, Governor Montague, said that this was a question of power, and not a question of justice, in the sense of undertaking to do justice without regard to law; that it was a question of power under the law. I accept that; I contend for that principle. It is a question of power under the law. And while I do not mean to be understood as saying that I am not prepared in any court of morals, or high equity, to justify the present apportionment in Virginia, if I could present to this committee the evidence that was before our legislature, and all the considerations that animated that body, I consider that we are precluded from entering upon that inquiry. You are sitting as a court, and as a court, you presume that the laws of Virginia were passed under proper motives and that the legislature had in mind considerations which are not now, and can not be, before this committee.

The legislative discretion is a wide one. They may consider things such as community of interest, facility of communication, the general topography, the rapidity with which population is increasing, and many other things with which the court has nothing to do, and which it can not know. This court can not take evidence as to these outside considerations, but I have no doubt of the power of the legislature to do so in the exercise of its discretion. (83 Wis., p. 169.)

Mr. NELSON. You are familiar with the further decisions of the court which say: "When they confine themselves within their constitutional rights?"

Mr. SAUNDERS. Yes.

Mr. NELSON. And if they go beyond that, we have a right to ascertain their motives?

Mr. SAUNDERS. Yes, if they pass that line. Now, with respect to whether our legislature has confined itself to the exercise of its constitutional rights, what more potent evidence could be afforded that it was within its rights than a decision of the supreme court of that State affirming that in laying off congressional districts the legislature was exercising a political discretion with which its court was not concerned. How would this tribunal be able to hold that the Virginia legislature made an unconstitutional enactment when the highest court of that State had declared that in making apportionments it was discharging a constitutional function which was its peculiar attribute, and one with which the court had no concern? Still, in order to seat the contestant and oust me, you are asked to override that interpretation of the organic law of Virginia which has been placed upon it by our highest court. That is the proposition in concrete form.

The court said in People *v.* Thompson (155 Ill., 461) that—

If a statute is within the authority of the legislature, as afforded by the constitution, it is valid, though resulting in inequalities and injustice.

There are many constitutional duties imposed upon legislatures which can not be enforced by the courts, and the manner of compliance with which must be left to the sole and final determination of the department upon which the duty is imposed. (Id., p. 474.)

Courts ought not to pass the boundary line inclosing the discretionary power of the legislature and invade that discretion. (Id., p. 476.)

In this case it was a question for the final determination of the legislature as to what approximation should or could be made towards perfect compactness of territory and equality of population, and this, too, though treating the requirements of the constitution as mandatory. (Id., p. 477.)

The CHAIRMAN. What are you reading from?

Mr. SAUNDERS. This is the case of People *v.* Thompson (155 Ill., 461). Nothing can be stronger as a statement of principle than the extracts I am reading. (Reading further:)

When the general assembly in the discharge of this duty has not transcended this power, though it may have performed its duty very imperfectly, its act is valid. (Id. p. 477.)

And then the case proceeds to discuss the questions of compactness and population, pursuant to the constitution of Illinois.

I wish to introduce further in this connection a citation from a decision of the supreme court of the State of Ohio. I have the case at hand, which is in 48 Ohio. The principle announced in that case is precisely the principle announced in 79 Virginia in Wise *v.* Bigger. The case cited is Campbell's case, and the citation is taken from the syllabus.

Where the governor, auditor, and secretary of state, or a majority of them, as the board created by section 11 of Article XI of the constitution, for the decennial apportionment of the State for members of the general assembly, have made the apportionment, they can not be required by mandamus, or otherwise, to make another apportionment, unless the apportionment as made, so far disregards the principles prescribed by the constitution as to warrant the court in saying it is no apportionment, and should be treated as a nullity. The apportionment made by the board, concurred in by the auditor and secretary of state, at the session of the board held April 13, 1891,

does not violate any of the principles prescribed by the constitution, and is a valid apportionment.

This apportionment was assailed as violative of the constitution of Ohio, on the ground that it was gerrymander; that the legislative discretion had been unwisely exercised. But see the answer of the court on pages 437 and 442.

It is not sufficient for us to be of opinion that we could make a better apportionment than has been made by the board. For us to interfere and direct another apportionment, the apportionment must so far violate the constitution as to enable us to say that what has been done is no apportionment at all. (Id., p. 437.) Whether the discretion imposed has been wisely or unwisely exercised, in this instance, is immaterial. The board had the power to make the apportionment. For the wisdom or unwisdom of what they have done, within the limits of the power conferred, they are answerable to the electors of the State and to no one else. (Id., p. 442.)

Mr. CARRICO. May I ask you this question? In what respect does the act taking Floyd County out of the Fifth district conflict with the constitutional provision which says that the districts shall be composed of contiguous territory, and as equal as practicable in population?

Mr. SAUNDERS. According to the argument of your associate this question is a federal one, and if that contention is well taken, the constitution of Virginia is foreign to this case. Your associate further maintained that this is a question of power. If that be true, then we should consider whether or not we have the authority to make apportionments and not whether a particular apportionment is a reasonable or an unreasonable one. But this does not mean that if I could bring before this committee the considerations which moved the Virginia legislature when it passed this act I would not be able to satisfy them that in all respects it was a proper act apart from any question of constitutional authority. But we are precluded from taking up that inquiry. Hence let us consider the question of power. If the legislature possessed the power to make apportionments, then it is not a matter of pertinent inquiry whether the apportionment under consideration was subject to criticism. We are concerned with the power of the courts to compel the exercise of legislative discretion.

For us to adjudge the act unconstitutional and declare it void would, in my judgment, be a most unwise construction, and would be to arrogate a power of interference as dangerous in the precedent as it seems unwarranted by law. (Carter *v.* Rice, p. 512.)

The decision of the legislature, in the exercise of discretion as to the apportionment of senatorial districts, is final and not subject to review by the courts. Yet jurisdiction exists in the courts to determine whether or not the statute is within such discretion. (People *v.* Thompson, 155 Ill., p. 451.)

The moment a court ventures to substitute its own judgment for that of the legislature in any case where the constitution has vested the legislature with power over the subject, it ventures upon a field where it is impossible to set limits to its authority, and where its discretion alone will measure the extent of its interference. (60 Ill., p. 86; Cooley's Constitutional Limitations, p. 200.)

There is a great difference in saying whether the principle of compactness has been applied at all, or whether the nearest practical approximation to perfect compactness has been attained. The first the courts can determine, the latter is for the legislature. (People *v.* Thompson, 155 Ill., p. 481.)

No district, unless a circle or a square, could be so compact that it could not be made more so. (Id., 482.) As much as the disposition of the legislative majority to obtain an undue partisan advantage by senatorial apportionment at the expense of equality in representation is to be deplored, the evil can not be remedied by the courts so long as the power to commit it is left in the body on which the duty to make the apportionment is imposed. (People *v.* Thompson, 155 Ill., p. 485.)

This is the crux of the whole matter, whether this final power of discretion shall rest with the legislature or shall be exercised by the courts in making apportionments.

Mr. NELSON. I want to get your argument, and keep it constantly in mind, to the question I gave you as to a concrete illustration of no apportionment at all. You gave me a gross violation as one, but now you deny it entirely. You say that we are not to look into that.

Mr. SAUNDERS. My answer to Mr. Carrico was in respect to a line of thought that he desired me to take up with respect to the Virginia constitution. I say that the act of 1908 is so far from the line of nullity, that it is not necessary for the committee to inquire into the details of that act in the respect of compactness and contiguity. In both particulars the act is constitutional.

Mr. NELSON. Supposing the counties were not contiguous at all; would that be a bar from looking into it?

Mr. SAUNDERS. Your question suggests a very different situation from any in this case. All the courts maintain that when a constitution requires that the counties of a district shall touch or that each district shall have a prescribed minimum of population, no exercise of discretion is called for. If the counties do not touch at all, or if the prescribed minimum is not afforded, the act will be avoided—all the courts hold this—but when the words, as nearly as may be, or kindred expressions are used in respect to compactness and population, the widest range of variation in these particulars is permitted to the legislature before the courts of New York, and other States cited deem that a court can avoid a legislative apportionment. In the first situation supposed the legislature is to do a ministerial act. The courts draw the distinction I have made in the cases which I have cited and upon which I rely. They say, for instance, that if the constitution of a State prescribes that in each district there shall be a population of 150,000 or that there shall be six counties and the legislature undertakes to make a district of four counties or one with a population of 125,000, then in a case of that sort there has been a failure to discharge a ministerial duty, and the act is void; but when a constitution prescribes that the districts shall be compact, or as nearly equal as may be in population, they hold further that the court can not prescribe a rule of mathematical conformity to be followed by the legislature. Such action on their part would be to eliminate the discretion of the legislature and set up a supervisory discretion in the courts, which those tribunals ought not to exercise in matters of this character.

Mr. NELSON. I may be somewhat obtuse about this, but I would like to have your thought along this line. Have you a right to look into the use of a discretionary power at all? If so, is it a question of degree with you?

Mr. SAUNDERS. I would say, frankly, it is. I do not believe, so long as you can say of an apportionment in Virginia merely that it is not fair, or that it is unjust, or that it is not such an apportionment as you would make under similar conditions, that you have reached the

limit of constitutionality. In order to avoid the act you must be able to say in the terms of the cases cited: "This is not an apportionment at all, it is a nullity.

Mr. HOWELL. When the court exercised the power of apportionment in 1906 with respect to the Fifth and Sixth districts, there seemed to be an inequality of apportionment and a lack of compactness of contiguous territory, and the legislature subsequently, with that disparity existing, goes to work and passes an apportionment increasing the disparity of population.

Mr. SAUNDERS. Yes; that is a correct statement of fact, but I maintain that the legislature of my State merely did what it had the legal right to do. I heard a great deal on yesterday about the unit of population to be considered in the make-up of the districts. I do not find that the States have practically regarded this unit in forming their districts. Hence it would seem that they have not considered that they were required to conform to it. Take the State of New York. As I pointed out on yesterday, the disparities between its districts are far greater than any that we find in Virginia. It has one district with 160,000, and another district with 450,000 population. I do not find that the matter of population seems to cut any figure, in the practical construction of congressional districts by the States, anywhere in the United States. If Virginia has the right to arrange her districts so that in the judgment of her legislature an arrangement is effected which will promote the best interests of her people, I do not see that such divergencies from the so-called unit, as exist in our present apportionment, are a matter of material consideration.

Mr. THURSTON. I shall insist, and I will give you the benefit of it right now, that the legislature of Virginia never apportioned the State under their constitution; that this act which we have been calling the apportionment act was not an apportionment act, but was simply an act attempting to destroy an apportionment already made.

Mr. SAUNDERS. Well, so far as that is concerned, every act which rearranges the districts is an act of apportionment. You may insist that one exercise of the power of apportionment exhausts the power of the State in this respect, but it is not even a plausible view that the second act is not an act of apportionment. I submit that the proposition that the second act is not as much a rearrangement of the districts as the prior act is one which has no basis of authority in any of the authorities cited. For a hundred years the States have been rearranging their districts, at their pleasure, without let or hindrance from any quarter.

Now, what does this case further say:

> For the wisdom or unwisdom of what they have done, within the limits of the power conferred, they are answerable to the electors of the State and to no one else. (48 Ohio, p. 442.)

In other words, this case repudiates the proposition that the courts should undertake to be a cure-all for every evil, or mischief of which an individual or a community may complain. The courts are doing a great work within their sphere, but the hope of the Republic is not necessarily in these tribunals. There was a time in English history when the rules and established decisions of the courts had to be overturned in the interests of human liberty.

There are many questions which for their ultimate solution must be left to the people. In my view this is one of them.

Counsel for contestant say that they filed some newspaper editorials critical of the act of 1908, which warned the legislature that they were treading on perilous ground; that the people would defeat them. If this be true, why is not contestant satisfied with the situation? We have played into his hands. I may well say to contestant, you are not consistent. If you are satisfied that the people will rebuke this action of the legislature, why not await and abide their decision? Why did you take your chances at the polls, and failing there, ask Congress to do what the voters would not do, namely, give you a seat in Congress? Why did you not apply to the supreme court of Virginia to avoid an act which you aver is plainly unconstitutional? Our supreme court is vested with authority to hear your case and would have entertained your application. Why did you not apply to it and thus save this committee the consumption of public time, which has been required for the hearing of this case, as well as save the country at large the expenditure of money which this case has involved? You took that appeal to the people which your newspaper authorities declared would be decided in your favor. Why have you not been satisfied to abide their decision?

Now, I desire to call the attention of the committee to a case in our supreme court that interpreted the Virginia constitution. Mr. Montague said on yesterday that he was going to show all sorts of things about that decision. He really made me apprehensive over a case that I regarded as supremely authoritative; but when he came to actually discuss the case he walked lightly, as he did when he treated of other matters in the course of his argument. He proceeded gingerly indeed, as one who not only skates on thin ice, but in addition is apprehensive of sudden pools in which he may find himself engulfed. The decision of the supreme court of our State in Wise *v.* Bigger is one of those pools. Governor Montague undertook to contend that the last apportionment act in Virginia is unconstitutional, on the ground that the legislative action violated certain constitutional requirements committed to its discretion. In connection with the case of Wise *v.* Bigger he referred to a fact that I want to bring out a little more elaborately, because nothing could tend so effectually to show how authoritative that decision is as a recital of the circumstances under which it was rendered, and of the political make-up of the court.

The legislature of Virginia had just enacted an act of apportionment. The Democrats were in power in the State for the first time in some years. The supreme court of that State, so far as its political views were concerned, held views adverse to the dominant party. As Mr. Montague said on yesterday, the president of that court was Judge Lewis, now district attorney of the eastern district of Virginia, a gentleman who has commanded the respect of the Virginia bar throughout his long career. The other members of the court were Judge Lacey, Judge Fauntelroy, Judge Richardson, and Judge Hinton. A proceeding to overthrow that apportionment was set in motion by John S. Wise, a Republican, who had represented the State of Virginia at one time as Congressman at large from the State. The act of apportionment which he drew in question was just as bad an act, if you choose to put it in that way, as the present act; or it

was just as good an act, if you put it in that way, as the present act. He raised before that court the very question of unconstitutionality which is presented here. What was the answer of the court?

Let us look to 79 Virginia for that answer. Governor Montague undertook o show that the question of unconstitutionality was not really and substantially before the court, but in that he was mistaken, as I will presently show.

It is further alleged by the relator——

And the relator in that case was a member of their own party, Mr. John S. Wise—

that this said act is unconstitutional and void, because the Senate had no right to recognize pairs; and because the act does not conform to the requirements of Article V, sec. 13, of the constitution of Virginia, by making congressional districts of contiguous counties, cities, and towns compact, and, as nearly as may be, equal in population. Each house of the general assembly is vested with the power of making rules for its own government; and it necessarily has the power to grant members leave of absence, excuse them from voting when proper, and recognize what are called pairs. But the laying off and defining of the congressional districts is the exercise of a political and discretionary power by the legislature, for which they are amenable to the people whose representatives they are. (Wise *v.* Bigger, 79 Va., p. 282.)

So they remitted Mr. Wise to the forum of the people.

Mr. NELSON. What year was that decision?

Mr. SAUNDERS. It was in 1884, when, I may say, politics ran higher in Virginia than at any other time within my recollection since the civil war. So that the usual influences which are supposed to animate human beings under such circumstances, so far as the court could be considered as affected by them, were in force to incline that tribunal to take that view of the apportionment act which was urged upon them by Mr. Wise's eloquence. The party of the court had just gone out of power. Political bitterness in Virginia was more intense than it had been for twenty years, so that the times were auspicious for the court to render a decision which would have been generally regarded as the outcome of political expediency and not a proper interpretation of our organic law. Such were the times and such the circumstances under which Mr. Wise assailed the constitutionality of an apportionment act on the plausible ground that it was a vicious and unconstitutional gerrymander. The answer of the court confounded the expectations of its party associates. Governor Montague complains of the brevity of this decision. The meat of the whole matter is there. Whatever we may say of its brevity it comprehends the whole situation; it includes everything that is said in the case of Carter *v.* Rice, People *v.* Thompson, and in the Ohio case, for the attitude of all of these cases is that the courts of these States do not care, for reasons of the soundest policy, to interfere with the exercise of political discretion by the law-making department.

Mr. HOWELL. What is the date of the act challenged there?

Mr. SAUNDERS. It had just been passed; in 1883 I think. The districts had just been rearranged. Mr. Chairman, the decision in Wise *v.* Bigger, settling the relation of our courts to acts of legislative apportionment, may be written in the compass of a man's hand, but its brevity is not a just ground of criticism.

History tells us that one of the world's greatest orations, Lincoln's speech at Gettysburg, was written on the back of an envelope. On

that occasion Lincoln followed a gentleman who spoke over an hour. And yet that effort is forgotten to-day, while Lincoln's speech will go sounding down the ages in omne volubilis ævum. And so with this decision to which I refer. It loses nothing by its brevity, and so long as it is unreversed, its authority is as potent as if its conclusions were spread over a thousand pages.

I venture to say, Mr. Chairman, that never did a court do a wiser thing than was done by our Virginia court when it followed that line of cases which holds aloof from making political decisions. No court can exercise this political, or quasi-political, jurisdiction, and escape public criticism of a character which saps public confidence in the tribunal. However wisely they may act, however proper their decisions may be, when they touch upon those things that relate to the governmental functions which are exercised under the stress of party passion and of party emotions, they can not escape a measure of public suspicion that their action is related to party and not to legal considerations. This suspicion affects the usefulness of those courts in the discharge of purely judicial functions. So the supreme court of Virginia said, in substance: "We will not enter on this troublous road. This cup is not ours, but that of the lawmaking department. Let them take up the burden, and for the discharge of these vexing functions be answerable to that ultimate tribunal, the people. We will content ourselves with the discharge of our purely judicial functions, undisturbed and unrelated to apportionments and the exercise of legislative authority."

Now, I want to ask another thing. Governor Montague relates his case to the power of the legislature. He did not undertake to argue questions of legislative discretion. He seemed to admit that if the legislature can make an apportionment, its discretion in matters of detail is extensive and comprehensive. But he did not point this committee to the way to overcome the force and effect of Davidson *v.* Gilbert, which presents a view both of right and of policy, directly contrary to the one which he maintains, nor did he advise this committee how to overcome the binding effect of Wise *v.* Bigger in construing the constitution of Virginia. It is a familiar rule of law that a federal court in construing the constitution of a State will follow that construction which has been afforded by the court of last resort of that State.

The decisions on this line are familiar to all of us. I have them here and can cite them. But it is hardly necessary to cite them in this connection. This committee, composed as it is of lawyers, knows the effect proper to be given to the unreversed decisions of the state courts by a foreign tribunal undertaking to construe local legislation.

If the case of Sherrill and O'Brien, 188 New York, is here, and I think it is, I wish to call the attention of the committee to its conclusions. It was suggested the other day that this case had reversed Carter *v.* Rice. But such is not the case. I repeat the proposition then made that if there is any decision that could emphasize the authority of Carter *v.* Rice it is this subsequent case.

In support of that proposition I will read you some of its conclusions.

Mr. SAUNDERS. It must be borne in mind, as a part of the facts, that Rice and Carter was decided upon a constitution which, when you

look at it, as cited in contestee's brief, is practically the constitution of the State of Virginia. (See Brief, p. 16.) That makes Carter *v.* Rice an authoritative case in support of the action of the Virginia legislature, in making the apportionment either of 1906 or 1908.

After that case was decided, the constitution of New York was changed by the convention of 1894. Then another apportionment was made pursuant to that constitution. That apportionment was reviewed in the court of appeals of New York and avoided. This is what the court says in that connection:

> Can it be doubted that in view of the history of the constitutional change, in regard to a legislative apportionment, which shows an actual withdrawal from the legislature of discretionary power and the continued adding of limitations upon their power relating thereto, and in view of the clear intention of the constitutional convention of 1894 and of the people in adopting the constitution, that this court should now hold that the minimum of discretion necessary to preserve county and other lines, and to give reasonable consideration to the other provisions of the constitution, is left to the legislature? Can we doubt, with respect to this legislative enactment, that it is subject to review by the court?
>
> While we recognize the binding force of the case of Carter *v.* Rice as applied to the facts then before the court, and in the construction of the constitution as it then existed, we are of the opinion that the constitution as it now exists should be construed so as to require that the legislature, in dividing the State into districts, make as close an approximation to exactness in the number of inhabitants in the districts as is reasonably possible, in view of the other constitutional provisions, and that such approximation is the limit of legislative discretion.

In view of that construction, not in view of any change of attitude toward the propriety of the decision—for several of the judges of the court who sat in the later case participated in the decision in Carter *v.* Rice—it is perfectly clear that the later case rests upon altogether different grounds from those upon which Carter *v.* Rice reposes. One of the judges, delivering an opinion in Sherrill and O'Brien, states that he would not agree with the conclusions reached except for the fact that the conditions had been changed by the promulgation of a new constitution.

But as showing how strongly some of the judges held to the idea that the courts should not meddle with legislative discretion, you will find a strong dissenting opinion in the later case in which the judge holds, in spite of the fact that there was a new constitution limiting the authority of the legislature and enlarging the authority of the courts, that the act which was drawn in question in that case was constitutional.

I will read further. This is from Justice Gray:

> I should hesitate to agree with the opinion of my brother Chase as to the unconstitutionality of the apportionment act if I were not convinced that the amendment of the state constitution in 1894 had materially changed the rules which should govern the apportionment by the legislature of the representatives of the citizens of the State.
>
> In the case of People, ex rel. Carter, *v.* Rice (135 N. Y., 473), which involved the apportionment act of 1892, and in the decision of which I took part, I was of the opinion that the then existing constitutional provision vested a certain discretion in the legislative body in exercising its power with which the court should not interfere when there had been neither a flagrant disregard, nor an unmistakable violation of the constitutional injunction, that the apportionment should be "as nearly as may be" according to the number of citizens.
>
> As may be discovered from the debates in the constitutional convention of 1894, the decision of the Rice case moved that body to recommend new provisions or rules for an apportionment. They were intended to remedy whatever defectiveness in the old rules made possible the inequalities observed in the preceding apportionment act.
>
> It is of great significance—

We find here the controlling authority for the decision in Sherrill and O'Brien—

And it necessarily has a most important bearing upon the attitude of the court toward the legislative action, that the article of the constitution (Art. III, sec. 5) expressly provides for a judicial review of any apportionment by the legislature.

A constitutional convention was needed to change the rule in Carter *v.* Rice for apportionments in the State of New York.

The legislature now exercises its power subject to review by the court of its act, which any citizen may invoke. The article, in its present form, as Judge Chase well points out, reduces the discretionary power of the legislature to a minimum. The limitations upon its exercise are relaxed, practically, only with respect to the preservation of county, town, and block lines.

I want to say in this connection that those constitutions which, like the Virginia constitution, have the words "as nearly as may be," have been construed by the courts as affording discretion to the legislature. But the court supra asserts that what had been hitherto discretionary in New York had been made mandatory by the last constitution. The judge proceeds:

In my opinion, before this amendment of the constitution, it was a grave and a doubtful question whether, in the absence of a gross and plain violation of the constitution, the court was justified in interfering with the execution by the legislative department of the government of its duty of apportionment. But by the amendment the matter is placed upon a different basis, and a duty is devolved upon the court to review an apportionment when complained of, and thereby to enforce the constitutional mandates as there expressed.

Mr. NELSON. Were the words "as nearly as may be" in the constitution in the Rice *v.* Carter case?

Mr. SAUNDERS. Yes; that is true.

Mr. NELSON. And are not the same words in this, practically?

Mr. SAUNDERS. The constitution is not before me, but the judge says, in what I have just read, that by constitutional enactment in that State the legislative act is subject to review by the courts. It is made expressly subject to review by the courts, and the legislature is stripped of that power of discretion accorded to it by Carter *v.* Rice. Now, just a word further.

Mr. TOU VELLE. Are there any more Virginia cases on that subject?

Mr. SAUNDERS. No. That case stands alone, and unreversed. And I want to call attention to that fact, a little further on. Another matter. Judge Werner dissents in Sherrill and O'Brien case just as a judge dissented in the Wisconsin case. I believe Mr. Nelson reported that case.

Mr. NELSON. I was acting as a newspaper reporter——

Mr. SAUNDERS. You remember that there was a strong dissent in that case.

Mr. NELSON. Not in the first case; they were unanimous in the first case.

Mr. SAUNDERS. But when the broad proposition was presented of interfering with legislative discretion in setting aside apportionments there was a strong dissent, and the dissenting opinion in that case is as good an exposition of the principle for which I contend as any exposition of it with which I am acquainted.

There is a feature of the Sherrill case to which I would like to call your attention. In order to overcome the binding force of Carter *v.* Rice, it was necessary to rewrite the constitution of New York, and

to write into it new language which gave the court the authority which under the old constitution they had declared that they did not possess. How is it in Virginia? In Virginia the case of Wise *v.* Bigger was decided under the old constitution, and later a new constitution was adopted. The language of the new constitution, with respect to the power of apportionment lodged in the legislature, while it is changed in form from that used in the old constitution, is in substance absolutely the same. (See brief, p. 24.) So in the one case if a new constitution was required to effect a rule different from that established in Carter *v.* Rice, would it not reasonably seem in the other that when the later constitution of Virginia reenacted the terms of the prior constitution, it affirmed the interpretation which had been placed upon that section by the case of Wise *v.* Bigger? Is that an illogical or unfair deduction from the facts?

I have before me the constitution of the State of Virginia. Section 55 of the present constitution replaces sections 12 and 13 of Article 5 of the old constitution, which are as follows:

Article V, sec. 12. The whole number of Members to which the State may at any time be entitled in the House of Representatives of the United States shall be apportioned, as nearly as may be, amongst the several counties, cities, and towns of the State, according to their population.

Sec. 13. In the apportionment the State shall be divided into districts corresponding in number with the Representatives to which it may be entitled in the House of Representatives of the Congress of the United States, which shall be formed, respectively, of contiguous counties and towns, and be compact, and include, as nearly as may be, an equal number of population.

That is the old constitution. That was the basis of Wise *v.* Bigger. Here is the new constitution:

The general assembly shall by law apportion the State into districts, corresponding with the number of Representatives to which it may be entitled in the House of Representatives of the Congress of the United States, which districts shall be composed of contiguous and compact territory, containing, as nearly as practicable, an equal number of inhabitants.

The most astute counsel the world has ever known could not discover any difference of meaning between the sections of the two constitutions. That is the situation in Virginia to-day.

The new constitution, by reenacting the substance of sections 12 and 13 of the old constitution, has affirmed the meaning stamped upon those sections of that instrument by the court of last resort. It is a familiar principle that when you enact the legislation of another State, which has been interpreted by the courts of that State, you are presumed to have adopted the interpretation imposed on the act by the courts of the sister State.

But that is not anything like so strong a case as this. A later constitution of my own State embodies in its provisions the substance of two sections of a former constitution, which had been interpreted by our supreme court. The later constitution would thereby seem to ratify that interpretation.

Now, I want to ask why it was necessary for this committee to be plagued here with this contest? Why was it necessary for public money to be expended in its prosecution and defense? Why was it necessary for your time, and my time to be consumed, to the prejudice of public interests, when the laws of Virginia afforded him two years ago a plain road of attack on the constitutionality of this act?

Mr. NELSON. I want to get at the facts. Where was the plain road open if the constitution barred it, as you say, that it would not leave a discretionary power because that was a matter for the legislature?

Mr. SAUNDERS. I say there was a plain road open to test the constitutionality of the act.

Mr. NELSON. But, if I understood you, the court in Virginia decided that it would not review the political——

Mr. SAUNDERS. That is true. That was the effect of Wise *v.* Bigger. But if they desired to have that case reviewed and reversed, if possible, our procedure afforded the contestant and his friends a simple method of submitting the whole question to our present court of appeals. Now, the fact that they did not make this application to the supreme court is evidence that they feared that Wise *v.* Bigger would be affirmed. Will this committee take a different view of a state constitution on an incidental question from that established by the ultimate court of that State? Is it possible that such a view as that could be maintained? If Wise *v.* Bigger is not good law, it could have been tested by an application to the courts of Virginia. If that is the law of Virginia, then contestant is asking this committee, a committee of Congress, to overthrow an interpretation of the constitution of Virginia afforded by the highest court of that State. That is the situation. I say the road was open to him. It was an easy road, too. I do not mean to say that it would have been easy to overthrow Wise *v.* Bigger, for I do not believe that the supreme court of Virginia would have reversed that case, and the fact that contestant did not make the effort to draw the statute in issue before our court is good evidence that he, too, holds to the same view. But it was an easy matter for him to raise the question before the court. Now, he comes to Congress and says: "I want you to upset an apportionment act, not by virtue of a congressional statute, but by virtue of the exercise of powers on the part of a state legislature, which the highest court of that State had affirmed to be its constitutional attribute. No like proposition, in the course of all time, was ever presented to the Congress of the United States.

Mr. THURSTON. Suppose some one had brought a case in Virginia to test that question and it passed through your courts and, in process of time, had been decided.

Mr. SAUNDERS. Yes.

Mr. THURSTON. Would that stand as a bar to the jurisdiction of the Congress of the United States to pass upon it?

Mr. SAUNDERS. You are asking a question that is easy of answer. In one sense, Congress is a law to itself. If, without regard to law, precedent, decisions, and constitutions, as expounded by the authoritative exponents of those constitutions in the States, this House, in defiance of these things, should chose to seat this, or any other contestant, it possesses the final authority to do so. It can say: "Away with the Virginia constitution; away with the federal statutes." This House possesses the authority to seat a contestant under any circumstances.

Mr. THURSTON. I am asking whether in that case that would be a bar.

Mr. SAUNDERS. In the sense that it would preclude this committee, as it would preclude a nisi prius court in Virginia, it does not. I do not say that it would. I do not say that this House can not disregard

our laws and the decisions of our courts on those laws if it chooses to do so.

Mr. THURSTON. What benefit would it be for a contestant to sit in any one session of Congress to have a proceeding brought in your state court which could be brought to your supreme court and then necessarily go to the Supreme Court of the United States?

Mr. SAUNDERS. Not necessarily at all. Why would it go to the Supreme Court of the United States on a question of the interpretation of state laws? The case would be brought in the state courts. Mr. Parsons was a member of the state senate when the law was passed. He claimed then that it was a palpable violation of the constitution of the State.

Mr. THURSTON. If it went to the question of the right of any man to represent any one of those districts in the Congress of the United States, it would involve a federal question which would allow either side to take it to the Supreme Court of the United States.

Mr. SAUNDERS. That brings us to another view. I am talking exclusively about the constitution of Virginia. Why would contestant have been delayed by submitting this question of constitutionality to our supreme court? He has been more delayed by the course taken than he would have been by an appeal to the court of his own State. If the supreme court of Virginia had decided that the act of 1908 was unconstitutional, the legislature would have had an opportunity to reassemble before the election and enact another statute of apportionment.

Mr. NELSON. Are you not assuming there that they would have gone into the merits of the case?

Mr. SAUNDERS. I assume that the contestant would have presented to the supreme court of Virginia the exact case that was presented in the case of Wise *v.* Bigger, that the statute complained of was an unconstitutional gerrymander. He would have presented the exact case presented to the courts in all these apportionment cases, namely, that the act complained of was unconstitutional.

Now, let me show you how easy it would have been to get this question before our supreme court. If that law was unconstitutional and void, it could have been attacked in a variety of ways. It is a maxim with us that a void thing can be attacked anywhere. According to the contention of Mr. Parsons, presented on the floor of the Virginia senate, this law was unconstitutional. He could have raised the question of unconstitutionality before the bill was enrolled by a mandamus proceeding. He debated its unconstitutionality and contended at the time that it was a nullity.

Mr. PARSONS. I was allowed ten minutes.

Mr. SAUNDERS. That was more than you needed to argue against a plain decision of our highest court. But the session was almost at an end and the time of all parties was very limited. However, I suppose you used the time given to direct your oratorical artillery upon the unconstitutionality of the act.

Mr. THURSTON. That was as much time as the court used in passing upon that particular question.

Mr. SAUNDERS. Oh, no; the opinion in this case was a very elaborate one.

Mr. NELSON. As a matter of fact, do they cite a single case or use any argument?

Mr. SAUNDERS. Was that needed in order to make the case an authoritative interpretation of the constitution of Virginia?

Mr. NELSON. I am asking as a matter of fact if the other cases were cited?

Mr. SAUNDERS. No. There were the other cases that might have been cited, but those citations would not have increased the authority of Wise *v.* Bigger as an exposition of our constitution.

Mr. NELSON. What do you say to Mr. Montague's point, that this case has not been cited?

Mr. SAUNDERS. He is simply mistaken. Mr. Montague came up here to argue a case upon which he had not adequately prepared himself. This case has been cited. It is true that the court does not cite any cases, but they sum up the whole proposition. We do not need the citation from any cases to make Wise *v.* Bigger the law of Virginia. It has never been reversed, and it has never been challenged.

The CHAIRMAN. What do you say about the exhausting of the power?

Mr. SAUNDERS. I will reach that a little later.

The CHAIRMAN. You will reach that later? Very well.

Mr. SAUNDERS. My friend, Senator Thurston, was speaking about delay in connection with an application to the courts to annul the act of 1908. Let me show you how simple the procedure would have been by a citation from Wise *v.* Bigger.

Mandamus: This court hath jurisdiction to declare what acts of the general assembly are, and what are not laws, and to award a mandamus to compel the keeper of the rolls to strike from the rolls, and the superintendent of the public printing to omit from the acts of the assembly, any act which, in the judgment of this court, is not a law, upon the petition of any citizen of this Commonwealth.

So I say that all that contestant needed to do was to walk across Capitol Square and file his petition for a mandamus to compel the keeper of the rolls to strike from the rolls an unconstitutional act. The supreme court would have issued a rule nisi at once.

Mr. CARRICO. Is it not a fact, as stated in that case, that the keeper of the rolls had placed it on the rolls and the printer had printed it?

Mr. SAUNDERS. Well, suppose he had; what of it?

Mr. CARRICO. That was a question of time.

Mr. SAUNDERS. That does not make any difference. Suppose the keeper of the rolls had enrolled the bill. This case declares that the court had the authority to have it stricken off. What difference does it make whether it had been entered or not, if it was an unconstitutional entry? All that was necessary was to secure a mandate from the supreme court directing the keeper to strike this nonentity from the rolls.

Mr. THURSTON. This contestant having the right to appeal to the tribunal fixed by the Constitution as the tribunal to decide upon his rights to a seat in this body, how is he to be prejudiced or reflected upon in any way because he did not pursue some other course?

Mr. SAUNDERS. For this reason. If there is a measure of discretion on the part of the committee with respect to entertaining a contest, this is a case in which that discretion ought to be exercised and the contest dismissed. In this case of Sherrill and O'Brien in New York, where an application was made to avoid an act of apportion-

ment, one of the judges declared in his opinion that the application ought to be dismissed, on account of laches. I think there was laches here, if the constitution of Virginia is relied on. Contestant ought to have applied to the courts of his own State for an exposition of that constitution.

The CHAIRMAN. But suppose your supreme court had passed upon it and these people knew that the decision would probably be adverse to them; didn't they have the right to bring the case here?

Mr. SAUNDERS. Oh, yes; they had the right. But having come here, and avoided raising the question of constitutionality in the courts of Virginia, how can they assert in the face of Wise *v.* Bigger, that the act of 1908 is unconstitutional?

The CHAIRMAN. No; having exercised their right as they have a right to, to come here, I don't think it helps the case at all to criticise their coming here. The question is, after having come here and raising the question that they do, it seems to me that the contention in this case that Mr. Thurston makes, more particularly than any other, is the exhausting of the power of the state legislature, and that is what I am very anxious to hear you on.

Mr. SAUNDERS. Yes; but I am trying to call attention to the confusion that has resulted from pursuing this course, instead of pursuing the other. This law was enacted in the spring of 1908 and it could have been passed upon and overthrown in Virginia if it was unconstitutional.

The CHAIRMAN. Certainly, and have saved us a great deal of work.

Mr. THURSTON. I do not think I misread this case when I say that the act of the Virginia legislature dividing the State into ten congressional districts at that time was the first act of apportionment that passed under the previous census.

Mr. SAUNDERS. Yes; that is right.

Mr. THURSTON. And also, that it was alleged or claimed that the districts as thus created were not of compact and contiguous territory.

Mr. SAUNDERS. I don't know anything about that, except what the court says.

Mr. THURSTON. But I am reading the allegations on which the bill is brought. There is no claim here that the legislature violated those provisions of the constitution which required the districts to consist of contiguous and compact territory and as nearly equal as possible in population with the other districts.

Mr. SAUNDERS. The court says that the laying off and defining of congressional districts, whether it is done well or ill, wisely or unwisely, judiciously or injudiciously, is an act of political discretion with which it has no concern. Whatever may be found in the preliminary part of the case, that is what the court says in respect to the principle for which I have contended here, which is that the court of my State will not interfere with the legislature when the latter is acting within its powers under the constitution as defined by the court. The laying off of congressional districts in Virginia is a political, not a judicial, function.

The courts of the States affirming this principle will not interfere unless the apportionment may be called a nullity.

Mr. THURSTON. That attacks, as I understand it, the power of the legislature to reapportion the State at any time; it does not attack the correct reapportionment?

Mr. SAUNDERS. Well, there is the decision of the court. If your view of it is correct, the court had no authority to make that decision, but you surely must be mistaken as to the facts.

Now, with respect to the exhaustion of power by the passage of one act of apportionment. Again, Governor Montague undertook to brush aside a precedent, a precedent that was established sixty years ago, by the case of Perkins *v.* Morrison, from the State of New Hampshire. I have before me the debates in that case, and I will say, in that connection, that any Member of this Congress, or a Member of any Congress might count himself proud to be able to discuss high questions of state as ably, as sufficiently, as comprehensively, as cogently, and as learnedly as the questions of that particular case were discussed. The case of Davidson *v.* Gilbert and the propositions enunciated therein stand in the way of contestant with respect to one claim of this case. It affirms the right of a State to make its own districts free from federal interference. The precedent of Perkins *v.* Morrison, so long as it is unreversed, affirms and supports the proposition that a State can change its districts at pleasure within a census period.

Mr. Chairman, why should not this be so? Sufficient reasons are constantly arising for changing the districts within a census period. If the proposition was of doubtful authority, every consideration of the soundest policy would operate to cause Congress to hold that the States ought to possess this power of changing their districts within that period. Growth of population, changes of population, changes of centers of population, growth of new interests, as the result of the development of the commercial centers of the country—one, or all of these considerations furnish at one time or another sufficient reasons for changing established districts. The possibility that the power may be abused is no reason why it should be denied. The right to apportion as often as it pleases, within a census period, ought to be left to the States. Up to the present time this power has been left to the States, and has been the subject of continual exercise. Does it ever suggest itself to these gentlemen, as a matter of political argument, that if the legislature of Kentucky, or Virginia, or Illinois, or of any other State that has gerrymandered—and I have talked with Republican friends in this Congress who have told me of some peculiarly shaped districts in their States—does it ever suggest itself, I say, that if this right is abused by the States it might be abused by the Congress of the United States? That suggestion furnishes a sufficient reason why the power should not be lodged in Congress.

I agree that if a power is conferred and the mode and time of its exercise is fixed, that that is a limitation on the exercise of the power. That proposition commends itself to me. But will my opponent tell me wherein that principle applies to this case?

I listened in vain on yesterday for Governor Montague, after he announced the principle, to which I gave my full assent, to tell me wherein any mode or time were imposed upon the legislature of Virginia, in respect to the apportionment of the State. Does our constitution fix either mode or time? Does the Constitution of the United States fix them? Does the act of Congress fix them so as to bring the power of apportionment in Virginia within that principle?

If they do I would like these gentlemen to cite me to the provisions upon which they rely to support their contention.

Of course I concede fully that either the Constitution of the United States or the constitution of Virginia could impose this limitation if it saw fit to do so. I am not contending against the proposition that by necessary implication either instrument could prescribe mode and time as efficiently as by direct prescription. One is as true as the other. But there is neither direct prescription nor necessary implication in this case.

The constitution reads:

Article I, section 3. Representatives and direct taxes shall be apportioned among the several States which may be included in this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years and excluding Indians not taxed, three-fifths of all persons. The actual enumeration may be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct.

Does that limit the States with respect to their apportionments? Is this section modified by the amendment, Article XIV?

Article XIV reads as follows:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding the Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State or the members of the legislature thereof is denied to any of the male inhabitants of such State being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the bases of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

What does the State of Virginia say? In my State, Mr. Chairman, our organic law imposes a limitation on the legislature in respect to apportionments for senators and members of the legislature, but there is no limitation with respect to congressional apportionments. Our constitution merely says:

The general assembly shall by law apportion the State into districts corresponding with the number of Representatives to which it may be entitled in the House of Representatives of the Congress of the United States; which districts shall be composed of contiguous and compact territory containing, as nearly as practicable, an equal number of inhabitants.

No mention of time there; no mention of manner there; nothing there which would bring the apportionment acts of our State within the principle that the gentleman announced. Here is the act of Congress—the apportionment act:

In each State under this apportionment the number to which such a State may be entitled in the Fifty-eighth and each subsequent Congress, shall be selected by districts composed of contiguous and compact territory containing, as nearly as practicable, an equal number of inhabitants.

This act, too, is silent as to mode and time.

The CHAIRMAN. What is the difference between those two sections of the constitution, the old and the new one, "as nearly as practicable," and the other, "as nearly as may be?"

Mr. SAUNDERS. I do not think there is any difference. But if there is, Davidson *v.* Gilbert announces that Congress can not and ought not to interfere with apportionments by the States.

If Congress ought not to do it, how much the less ought one House to do it?

I could not follow Mr. Montague on yesterday in the conclusion which he drew from the fact that the act of 1842 was not the same as the present act. That is true, but the two acts differ in a respect that does not touch the argument with respect to the exhaustion of the power to apportion by one exercise of the power.

The familiar principle that whether or not an agent, with respect to a power conferred is entitled to more than one exercise of the same is determined by reference to the terms of the grant of power, might be applied to this case.

The grant of power to make apportionments is primarily made by the Federal Constitution, and the federal act supposedly passed in pursuance thereof; secondarily in my State, by the constitution of the State. These instruments will be searched in vain for language to support the contention that the mode and the time for making congressional apportionments has been fixed or prescribed in anywise.

Now, what about Perkins and Morrison? This case, too, though a case precisely in point, must be brushed aside, because it is a political precedent. New Hampshire was districted under one census and within two years the State was redistricted. Then there was a vacancy in one of the districts, and the district in which the vacancy occurred was not the district in which the member who created that vacancy by resignation had been elected. But while that was true, that relates to another feature of the case, not important in this connection. There were two acts of apportionment within one census period. There is no question about that. Mr. Montague said that Perkins *v.* Morrison was reversed in effect by the case of Hunt *v.* Menard, from the State of Louisiana; but he did not advert to the fact, which is a fact, that so far as that supposed reversal by Hunt *v.* Menard of one branch of Perkins and Morrison is concerned, that reversal was itself reversed in the case of Pool *v.* Skinner.. Very properly, he said that the case of Hunt and Menard, by reason of other features involved, should not be considered as authority. It was too much complicated with other questions. On account of the confusion of districts in the State of Louisiana, intimidation and other complications, the House held in that case that neither contestant nor contestee was entitled to a seat. The House did declare in Hunt *v.* Menard that when a vacancy was created by a member resigning in a district, or dying in a district, and the district in which the election was held was a different one from that in which the original election was held, the second election was void.

Hunt *v.* Menard is authority for that proposition, so far as it is authority; but in the case of Pool *v.* Skinner, from North Carolina, which is a recent case and in which the same state of facts were presented as in the case of Hunt *v.* Menard, it was held that there was no merit in the proposition that the districts were different because a redistricting had occurred. In that case the member who was elected in the district as it stood after the second act of apportionment was declared to be entitled to his seat.

So you see Hunt *v.* Menard, in the only respect in which it could be said to reverse the case of Perkins and Morrison, has been reversed itself. So that Perkins and Morrison stands to-day with the full force and effect of that authority, whatever authority that may be.

Mr. CARRICO. In the case of Pool *v.* Skinner, I suppose you will admit that that was the first redistricting under that census.

Mr. SAUNDERS. That proposition was advanced by Governor Montague on yesterday. I don't know that I am disposed to gainsay it as a proposition of fact. I don't know whether it is correct or not. If it is the fact, all right. It does not disturb the binding effect of Perkins *v.* Morrison, which remains unchallenged to this day.

Now, I want to read the report in that case.

The CHAIRMAN. That is the New Hampshire case?

Mr. SAUNDERS. That is the New Hampshire case; yes. Just as the report in this case of Gilbert and Davidson is a striking and authoritative exposition of one feature of the law in this contest, so is Perkins *v.* Morrison equally conclusive in another direction.

That case is found in Hinds, volume 1——

Mr. CARRICO. Section 311.

Mr. SAUNDERS. I don't know whether that gives the section for which I am looking. But that reference will enable me to find it. You are right. Here it is (reading from Hinds, vol. 1, sec. 311):

The majority of the committee found as follows:

"By the Constitution of the United States, the right to prescribe the times, places, and manner of holding elections for Representatives in each State is declared to be in the legislature thereof, subject to the superior power of Congress to make or alter such regulations by law."

The proposition that Mr. Montague advanced on yesterday that the power of the States to make apportionments is not derived from section 4 of the Constitution heretofore cited, is not sustained, so far as I am aware, by a single precedent. Every speaker and every precedent touching on the derivation of this power relates the same to that clause of the Constitution—every one of them. The committee says further:

That power, however, Congress has never exercised, unless it was partially exerted by the second section of the act of June 25, 1842, to which reference has already been made. Limited only therefore by the provisions of that section, the legislature of New Hampshire had plenary power to prescribe by what districts the elections should be made and to change the boundaries of those districts at its pleasure and at any time. No constitutional provision, no law of Congress, restrains this right originally to form, or subsequently to alter, the limits of congressional districts, at the discretion of the state legislature.

If I had undertaken to prepare the statement of this proposition, so as to put it in the most emphatic and conclusive form for the purposes of my contention, I could not have stated it more explicitly than the committee has done.

It is conceded that Congress could by law have exclusively determined the extent of each district and enacted that it should remain unchanged under the apportionment during the entire period of ten years. But this has not been done. The act of June 25, 1842, only enacted that the elections (alike general and special) should be by districts of contiguous territory; and, under the law, the limits of each district must be as they were before its passage—such as the legislature of the State may from time to time prescribe. The act of Congress is merely commendatory. It was not possible to delegate to the state legislature the legislative power vested by the Constitution in Congress. It follows, of course, that the districting acts are the untrammeled action of the legislative assembly of New Hampshire and, consequently, that the power to change the boundaries of a district remains unlimited in the same legislature. Your committee are not informed the disposition has hitherto ever seriously been controverted. Such appears to have been the common understanding. The legislatures of several of the States, after having formed congressional districts, in conformity with the recommendation of the act of Congress of June 25, 1842, have subsequently redistricted the States or made changes in the boundaries of the districts previously formed. North Carolina, Georgia, Ohio, and Pennsylvania are among the number.

So it seems that even in that day the State of our friend from Ohio, Mr. Tou Velle, was exercising the right, which it has since continued to exercise, to change its districts within a census period. This right has been in continuous exercise by the States.

The report adds:

More than 20 Representatives elected by these remodeled districts sit unchallenged in the present Congress.

I don't know how many sit in the Sixty-first Congress under the same conditions. It is not necessary to inquire.

In the matter of the case of Davidson *v.* Gilbert, I remember that on investigation I found that the legislature of Kentucky, subsequent to the passage of the act which formed the basis of the controversy in that case, effected another change in its districts within the same census period.

Now, Mr. Chairman, so much for this branch of the case. This is the answer which I make, in the terms of law and weighty precedent, to the proposition that Virginia has no right to change her districts at her pleasure. This precedent affords my answer to the proposition that in the exercise of "our untrammeled right," as Perkins *v.* Morrison puts it, to rearrange our districts, we violated either the state or the federal constitution. The case which they cite from the State of Indiana does not apply, by its very terms, to a situation like the one in Virginia, nor is the case that was read on yesterday by Governor Montague any more apt or pertinent. What does that Indiana case say? And, mark you, Mr. Chairman, the Virginia act of 1906 was not a general apportionment of the State, in the sense that the legislature took up the districts as a whole and rearranged them throughout. The act of 1906 made but one change in the districts of the State as they had existed for a great number of years, probably since 1883. The legislature allowed those districts to remain without change, save in one respect, and yet our friends style this legislation an act of general apportionment.

The act of 1906 merely took one city out of the district of my friend Mr. Maynard and put it into the district of my friend Mr. Jones. The act of 1908, two years later, took the county of Craig out of the ninth district and put it into the tenth district, and the county of Floyd out of the fifth and put it into the sixth district. These changes did not make the act one of general apportionment.

Now, what does that Indiana case say? Let me call attention to some of its features.

The constitution of Indiana provides that the members of the senate and house of representatives shall, at each session next following each period of making such enumeration, be fixed by law and apportioned among the several counties according to the number of male inhabitants over 21 years in each. Under this language the court of Indiana could have done nothing else than what they did. It was not even an open question under the terms of the Indiana constitution.

"The language used fixes the time and mode with the utmost particularity and may be considered as an implied inhibition on the legislature to make more than one general apportionment." (144 Ind., pp. 510–512.)

Here is what the Supreme Court holds in the case of Slauson *v.* Racine (144 Ind., 513):

From the general scope and object of the Indiana constitution, it may be said that a general apportionment fixed for one time, say once in five years, when once done in that period may not be done again in that period, and this implication, perhaps, would extend to any particular organization of assembly or senatorial districts by any law passed directly for that purpose.

This concluding statement instantly suggests that even under the authority of this case a partial apportionment could succeed a general apportionment within a census period.

A change in one or two counties in the make-up of two districts would certainly be a "particular organization." Another case was cited yesterday in this connection—have you got that case, Senator, the Illinois case [addressing Senator Thurston]?

Mr. THURSTON. 172 Illinois, page 499.

Mr. SAUNDERS. That is the case of People *v.* Hutchinson, and contains a statement of the very principle for which I contend, namely, that unless the time and mode of making an apportionment is prescribed by some paramount authority the power of the legislature to make succeeding apportionments is untrammeled and unrestricted.

In regard to the subject of legislative apportionment, the legislature might, under a full and unrestricted vesting of legislative power, enact apportionment laws at their pleasure; but a fixing by the constitution of a time and mode for the doing of such act is, by necessary implication, a forbidding of another time or mode and a prohibition of the exercise of the power in any other way.

Thus, by implication, forbidding any other time and mode.

This case, as will be noted when the committee comes to read it, simply announces the fundamental proposition that when a limitation is found either in the organic law of the federal jurisdiction, or of the state jurisdiction fixing the time and mode for the legislative bodies to make apportionments, such a limitation will restrict the legislature to one exercise of the power granted. Apart from this limitation the States enjoy full legislative discretion in the matter of making apportionments from time to time.

With respect to the action of the Virginia legislature, in order to convict it of illegality in passing the act of 1908, it is necessary first to overturn Perkins *v.* Morrison, and, second, to establish with reference to its action a like state of facts to that which existed in the States of Indiana and Illinois. Otherwise you can not bring this act within the principle announced by the courts of those States.

If these gentlemen say that there is an express limitation with respect to time and manner, let them point it out. If it was an open question whether or not a State could make its apportionments at its pleasure and would contend as a matter of sound policy for this right on the part of the States, free from interference by Congress.

Mr. NELSON. What do you think was the basic reason that caused these States like Indiana and Illinois to so frame their constitutions as to prevent repeated apportionments. Why would people framing a constitution put that provision in it?

Mr. SAUNDERS. Well, I don't know the particular reasons for the distinction made. Probably the considerations were local to those States. All I know is that they did not do it in one instance, and did not do it in the other. We made the same distinction in Virginia. Doubtless the reason for the distinction may be found in the fact that

as all the States have exercised the untrammeled right to make congressional apportionments at pleasure, no one State cared to limit itself in that respect. Most, if not all, of the cases relating to apportionments which have been set aside by the courts relate to apportionments of assembly and senatorial districts.

Mr. NELSON. The thought occurred to me that possibly there was some evil that they were trying to prevent.

Mr. SAUNDERS. Well, if there was some evil they were trying to correct with respect to legislative districts they seemed to be indisposed to go any further and apply the principle to congressional districts. Evidently they thought there was evil in the one situation and not in the other.

I would like to read one selection in this connection from the debates published in the Congressional Globe. I will read this, because it appears from the debates that at that time they discussed some of the very questions under consideration in this case. These debates in the case of Perkins *v.* Morrison will serve to show that the statesmen of that day brought all their powers of keen analysis to the solution of the questions which then, as now, were of interest to the public. At all times the relation of the Federal Government to the powers of the States has been a problem of absorbing interest. The speaker in this case was a Member who did not agree with the wisdom of the New Hampshire act making the second apportionment; he did not agree with the policy of that act; he did not agree with the propriety of the passage of that act. He says:

I am compelled to vote contrary to what would be fair and agreeable to abstract justice. I don't think the act of New Hampshire to which reference is made is a fair and just measure in its operation——

The CHAIRMAN. From what page are you reading?

Mr. SAUNDERS. This is Congressional Globe, page 189, volume 20.

In this discussion gentlemen on the other side seem to me to have made four or five false assumptions. In the first place, it is a false proposition that we are Representatives of districts and not of States. It is also a false assumption that this House, or Congress, has the right to enforce, within the limits of a State, in reference to elections, whatever we may suppose to be justice and equity, irrespective of the laws and authority of the State.

Upon the theory that Congressmen are Representatives of the States and not of the districts, Congress at a later period, and after the passage of the first apportionment act, seated a number of Congressmen who had been elected at large in their respective States.

It is a false assumption, too, that justice and right, private or public, within a State, is less safe in the hands of the people of the State than in the hands of a majority of this House or a majority of Congress. It is another false assumption that wherever a State might by possibility abuse its powers and do injustice to a portion of its citizens, there results to this Government a power of ratification and indemnification, as though this Government were incapable of doing wrong or of interfering with state action, except when a State had done wrong. False as these assumptions are, the argument on the other side had no other foundation. The gentleman from Kentucky (Mr. Thompson) has dwelt upon the abuses which a State might commit to the injury of its citizens if an act like that of the legislature of New Hampshire should be recognized by this House. It never occurred to him that the people of a State might be quite as secure against injustice at the hands of their own legislature as at the hands of a majority of Congress or of this House, especially where that majority does not include a single Representative from the State. He did not reflect that the framers of the Constitution may have acted on the principle that the people of a State were as safe in their own hands as in the hands of others. In the opinion of some persons, it is so absolutely certain that the majority here will do no wrong, even to those whom they do not represent, that the bare possibility that the state legislature might do

injustice to those they do represent is a sufficient reason for putting such legislatures under congressional duress.

Those reflections are as wise to-day as they were in that time.

Further, from the same argument:

But it is strangely contended that Congress can go into a State, distribute and localize suffrage, apportion Representatives among districts, determine the basis of apportionment, whether it shall rest upon voters or population; or upon white population, or free population, white and black; or upon white or black population, bond or free, or upon any other basis.

* * * * * * *

Sir, the language of the Constitution refers to the election of Senators as well as Representatives; and if that language authorizes you to divide the electors of Representatives, how is it that it does not authorize you to divide the electors of Senators? If you can district the people, why not district a legislature—give to one body the election of one Senator, to the other the other Senator?——

* * * * * * *

Now, sir, in relation to the case before the committee, the use I make of the argument submitted is this: If Congress can district a State, it can control a State districting itself. If Congress can determine and regulate the internal rights of the people of a State, it can interfere with state laws enacted for that purpose. If the power of regulating these matters belongs to a State, it is no business of ours how that power is used by the State. If the state laws interfere with no provisions of the Constitution, and no law of Congress passed in pursuance of that Constitution, it is our duty to observe them, however capricious, or however unjust to a portion of the people of the State.

Mr. THURSTON. Is it your contention that Congress could not, if it saw fit under the Constitution, define the limits of every congressional district in the United States?

Mr. SAUNDERS. I believe it is asserted by some of the authorities cited that Congress can do that; but until Congress exercises that power I maintain that the power of the States is unlimited in this direction.

Mr. THURSTON. But if it can do it——

Mr. SAUNDERS. In respect to the power to do so, on the part of Congress, that question has never been authoritatively and finally settled, so far as I am aware. That is a large question, and I do not undertake to discuss it in this connection. Upon the question of the right to my seat, we are already wading in pretty deep waters, and I do not care to enter upon a discussion of the question of whether Congress, under the Constitution of the United States, has a right to define the limits of every congressional district in the United States. Davidson *v.* Gilbert does not seem to think it possesses that power. But conceding that it possesses that authority, it has never exercised it.

Now, Mr. Chairman, it is half past 10 o'clock. I have been speaking something like two hours and I have no doubt that the committee is weary. I would like to proceed to-morrow at the pleasure of the committee.

Mr. NELSON. We have taken some of your time in order to get light.

Mr. SAUNDERS. As I said in the beginning, in respect to matters of fact and of law, it is a pleasure to me to have you ask questions; because while I do not undertake to say that I can satisfy you by my answers, I am at least given the opportunity to cite you to those authorities and to those facts which, in my judgment, constitute an answer to the questions propounded. So, with respect either to the law or the facts I welcome queries.

(Thereupon, at 10.30 o'clock p. m., the committee adjourned until to-morrow, March 4, 1910, at 10 o'clock a. m.)

FRIDAY MARCH 4, 1910—10 O'CLOCK A. M.

The committee met pursuant to adjournment, Hon. James M. Miller (chairman) presiding.

The CHAIRMAN. Mr. Saunders, we are ready for you to proceed.

STATEMENT OF EDWARD W. SAUNDERS—Continued.

Mr. SAUNDERS. I want to gather up a few threads of the matter we had under discussion last night and put them into the record.

I understood Senator Thurston to say last night that he proposed to challenge the binding force and effect of Wise *v.* Biggar, 79 Virginia, on the ground that the "gerrymander" feature of the case was not properly before the court. Is that correct?

Mr. THURSTON. As to gerrymander not being properly before the court, not properly stated in the allegation, that that was not in the case at all.

Mr. SAUNDERS. I thought at the time that Senator Thurston was mistaken when he made that statement, but of course I was not able at the time to go through the report and point out his error. But he is absolutely mistaken, and I wish to call his attention to page 272 of the case, where the court recites the allegations of the plaintiff in full to the effect that the act in issue was unconstitutional, on the ground that it violated the constitutional requirements as to contiguity, compactness, and population. So much for that.

A number of questions were asked me on yesterday in relation to the supposed unit of population, necessary to be had in view, in laying off congressional districts. There is no unit of population that the States have practically regarded in the make-up of their districts. There is a unit used by Congress in determining how many Representatives a State shall have under a given census, but with that use the unit seems to pass from sight. My district has been criticised because it is about twenty thousand people short of the supposed unit to which the districts must conform with mathematical exactness, in the view taken by Governor Montague. Hence, presumably, the Fifth Virginia District is not a valid creation. But if conformity to the unit is the test of legality, there are other districts in my own State which can not respond to this test. Even as it stands my district is not the smallest in the State.

The CHAIRMAN. There is one other smaller.

Mr. SAUNDERS. Yes, there is another district smaller by five or six thousand. If my district will not be allowed to remain in its present form, on the ground that it is too great a departure from the unit of measurement, what will the committee do with the Sixth California District, which has a population of 155,000, or with the first Iowa with a population of 159,000, or with the third Connecticut with a population of 129,619, or with the third Kansas with a population of 157,842, or the fourteenth Pennsylvania with a population of 146,769, or the eighth Kentucky with a population of 143,089? The widest variation of population between the Virginia districts is less than 60,000. In Connecticut the widest variance is 181,000, in New York 450,000, in Pennsylvania 770,000, in Michigan 109,000, and in Ohio 91,000. For other great disparities see contestee's brief, page 31.

Third Kansas with a population of 157,842, or the Fourteenth Pennsylvania with a population of 146,769, or the Eighth Kentucky with a population of 143,089. The widest variation of population between the Virginia districts is less than 60,000. In Connecticut the widest variance is 181,000, in New York 450,000, in Pennsylvania 110,000, in Michigan 109,000, and in Ohio 91,000. For other great disparities see contestee's brief, page 31.

The CHAIRMAN. Unfortunately, the Fourth Kansas is my own district. I want to call attention at that point to the fact that Shawnee County, where the capital of the State is located, Topeka, and which has a population of over a hundred thousand, Shawnee County was formerly in the Fourth Congressional District represented by Mr. Curtis. The Populist legislature was in power at that time and had a majority in the legislature. They wanted to defeat Mr. Curtis for election, so they took his county with a Republican majority of 3,500 and put it over into the first district, that was already Republican by six or eight thousand, and put another county in the fourth district which had a Populist majority of 1,500, making the fourth district, the one Mr. Curtis formerly represented, and the one I now represent, Populistic by 1,240 majority on the vote of two years before. It was done in order that they might elect a Populist Member of Congress and defeat Mr. Curtis, a Republican. After the next election, however, things had changed somewhat, and Mr. Curtis in the new district, with only his own county behind him, was nominated for Congress and elected. And in the fourth district I was nominated, possibly on the theory that I could not be elected, but every county in that district gave a Republican majority in that election.

Mr. SAUNDERS. In other words, the appeal was made there to the people?

The CHAIRMAN. Yes.

Mr. SAUNDERS. That is one of the points I am making in this case, that the appeal ought to be made to the people.

The CHAIRMAN. There is no controversy there over the second apportionment. It was a matter to which everybody yielded. There was no claim on the part of anybody that it was not proper for the legislature to apportion the State in the way it did at that time.

Mr. THURSTON. Our position in this case is this: It might not be considered that these original districts had been arranged in an improper apportionment; there might not be found such a disregard of the provisions of your constitution or the act of Congress that a court could clearly say the general apportionment act was unconstitutional or in violation of the statutes of Congress; but where the State had fixed districts and where one district is smaller and is further from complying with the requirements of contiguous territory, and thereafter the part of the smaller district is removed and attached to the large one, and also the contiguous character of this territory is measurably destroyed by that act, there is a case where we insist that it is not an apportionment under the constitutional provisions, that it can not be excused on any possible theory of an attempt to more nearly comply with the requirements of law, and that therefore it furnishes that extreme case that is not warranted either under your constitution or the act of Congress.

Mr. SAUNDERS. I understand that is your view of the question, and while that is a plausible view, it is absolutely specious. It is far from being convincing and sufficient, for this reason: Senator Thurston's associate announced that the question presented in this case is one of power. I agree with him. Governor Montague claimed that it was a matter of conformity to the unit, and in effect maintained that with pen and paper he could determine in a moment whether an apportionment ought to be vacated. He had only to figure out by a simple process of subtraction the amount of departure from the unit, and the question of constitutionality was solved. If the Fifth Virginia District could in the first instance have been constitutionally established in its present configuration and with its present population, how can it be said that because the legislature did not reach the constitutional limit in the enactment of 1906 it could not move up to that limit by the second act? When the legislature moved toward it constitutional limit, and established by its second action a district that it seems to be conceded would have been constitutional if established in its present form by the first enactment, how, and wherein, has it done anything objectionable from a legal standpoint, or from a standpoint of power, by that action? Unless the legislature is limited to one act of apportionment, it surely can do in the second instance what would have been constitutional in the first. Once concede that the district in its present form would be constitutional under some one enactment, and the case is conceded out of court. If a State can district itself as often as it pleases within a census period, and that question is reserved for further consideration, it inevitably follows, as a matter of power, that a thing which can be done at one time can be done at another, whether that other is the second or the final exercise of authority. The second or the third acts may be unfair or unjust, but they are not, as a matter of necessity, unwarranted. The words are not equivalents.

Of course, Mr. Chairman, all apportionments have a measure of political advantage in contemplation. As members of political organizations, and students of political history, we all understand that. The Father of his Country figured at one time in a local gerrymander, and no doubt thoroughly squared his course with his conscience. We need not be humbugs about this matter of arranging the States into legislative and congressional districts, or affect any superior attitude for any one political party. I do not suppose that a political organization ever arranged its congressional or other districts that it did not have in mind some party advantage—that it did not couple party considerations with other impelling motives. This is as true of Kansas, a Republican State, as of Kentucky, a Democratic State. It is as true of New York as it is of Virginia; of Illinois as it is of North Carolina. But the losing party merely bides its time, and waits for its revenge, which generally comes. A friend of mine from Iowa was telling me a few days since of some peculiarly shaped districts in that State, and of one in particular which, some years ago, grouped the Democratic vote, which made other districts doubtful, into one solid Democratic district. This was not done to help the Democrats, as a matter of course.

Mr. THURSTON. Would it not be a good thing to do that nationally, to throw all the Democrats together? [Laughter.]

Mr. SAUNDERS. If your contention is sound, that Congress can, and ought to, arrange all the congressional districts, or at least exercise a compelling force in the matter, then in time we would have a national gerrymander, and logically the Supreme Court ought to be vested with power to overlook the action of Congress and to supervise the exercise of its discretion. That Congress is not averse to a little gerrymandering is shown by the Oklahoma enabling act.

Coming back to Virginia, why should Governor Montague's unit rule be applied to overthrow the districts in that State, when those districts are in no wise remarkable for their disparities?

What would Governor Montague have this committee to do with the Fifteenth New York, with its population of 265,000, and the Eighteenth New York, with its population of 450,000? Will he ask for the application of the same rule to these districts that he desires to see applied to the Virginia districts? Is Congress to run amuck among the States, unseating every Member whose district shows an appreciable divergence from the unit of population? If so, it will be occupied for quite a while to come in rectifying the divergences that exist in practically every State in the Union. When we enter upon this colossal job of house cleaning, there will certainly be a respite from our activities in other directions. I have not cited the disparities in other States in order to contend that if they are doing wrong Virginia ought to be granted the same privilege. I have cited them for a very different purpose. I have cited them to show that this uniform and uninterrupted disregard of the so-called unit, or standard of population for the districts, is sufficient evidence that the States have not regarded conformity to the unit, even to a measurable degree, as a constitutional requirement. But in connection with the suggestion that the population in my district is so far below the standard, is so flagrant a departure from the unit that the act of 1908 is stamped upon its face with illegality and ought to be avoided instanter, I wish to cite you again to the case in which a contention of this character, upon a far stronger and more compelling state of facts, was disregarded by the House. This is the case of Davidson *v.* Gilbert, which is in all respects on fours with the case in hand. It would be difficult to conceive a stronger authority for a portion of my contentions than this case. In all the elements of outrage, so called, the Kentucky gerrymander easily distanced the comparatively mild performance afforded by the Virginia statute.

The Eighth Kentucky District was a Republican district converted into a Democratic district by the Kentucky act. This act by removing a large Republican county from that district reduced its population to 143,000, thus bringing it over 17,000 below the present population of my district. A Democrat was elected in the new district, and his seat was contested before a Republican House by his defeated Republican opponent. Upon this state of facts, the committee denied the right of Congress to interfere, under the constitution, and then conceding pro arguendo the power to interfere, advised against interference in the most forcible terms.

Mr. KORBLY. If I understand you, in that case the departure from the unit was greater than in your case.

Mr. SAUNDERS. Immensely greater. According to the record, the Eighth Kentucky District has a population of 143,000, as against a population of 160,000 in my district, showing a difference of 17,000 in my favor. The above facts were in the knowledge of the committee which heard and reported on the case.

Mr. Nelson on yesterday asked me a question which I would like to answer a little further this morning. It was a pertinent question, and proper to be asked. He asked me how I would take the rule of the cases of Wise *v.* Bigger, Carter *v.* Rice, and the other like cases, and make a practical application of it. This practical application is not difficult. I would use the facts of the decided cases as a sort of measuring rod. The courts announced in those cases that they would void any apportionment which was so outrageous that it could be fairly styled a nullity. Hence, the apportionments which they sustained evidently do not fall in that class. We know at least what are not nullities. There is no indication in the opinions that the apportionments under consideration approached the danger line. Hence, it is a reasonable inference that these courts, with a strongly indicated objection to interfering with the legislative discretion, would sustain apportionments even more unequal and unfair than those under review. We know the facts of the decided cases, and comparing them with the facts of the Virginia apportionment, it is a fair conclusion that whatever the statute of 1908 may be as a gerrymander it is far from being a nullity.

The facts in Carter *v.* Rice presented a much stronger case for the complainants than the facts of this case in behalf of contestant. The New York constitution closely resembles ours, and the cited details of the apportionment in issue showed a violent departure from its requirements.

Mr. NELSON. That was simply decided, was it not, on the question, first, they assumed jurisdiction, and then they said the legislature had not overstepped the constitutional discretion?

Mr. SAUNDERS. Yes; that is what they did. They assumed jurisdiction and then, after saying in substance that it was a pretty rank apportionment, they declined to interfere on the ground that bad as it was they could not say that there was no apportionment at all.

Mr. NELSON. I understand, if I follow you correctly, that you hold that in Virginia, under the decision of that court, they will not look into this matter at all, because they would have to exercise a political power with which the court has nothing to do?

Mr. SAUNDERS. No; I do not say exactly that. I say that our court has stated the principle of noninterference with legislative discretion more strongly than any other court. Yet, pushed to an ultimate analysis, if an act was passed in our State which could be fairly said to be no apportionment, I believe our court would interfere to avoid it; but the Virginia court states in the strongest possible terms its indisposition to interfere with this exercise of legislative discretion.

Again, I think that the question that was put to me might be answered in another way. I would say that pursuant to these cases an apportionment would stand so long as the comments on the same would be of the following character: "Well, that is a bad apportionment," or "It is unfair, unjust, and unequal," or "It is a

gerrymander," or "It was done for political and party purposes and is utterly indefensible." So long as the comments take this form, courts (like Carter *v.* Rice) would decline to interfere, preferring the mischief of political apportionments to the evil of judicial interference. So long as it can be said of a district that it includes a considerable body of inhabitants and that the successive counties are contiguous, though the outline of the whole may be strikingly irregular, that district is an exercise of legislative discretion, of political discretion, as the Virginia court states the proposition, and must be allowed to stand.

No one looking at the map of the Virginia districts, as the same appear in the directory, and comparing them with the districts of other States, even if the shape of the fifth district is criticised, can be unmindful of the fact that all of our districts are of considerable size. No one upon such an inspection, with actual knowledge of the population of the latter district and its relation to the population of the other districts, could say that the apportionment of Virginia into districts was a nullity, that there had been no apportionment at all. Doubtless a variety of apportionments, far different in detail and conceivably an improvement upon the present apportionment, could be made in Virginia, all of them well within the constitutional power of the legislature; but these apportionments might all be subject to the same criticisms which are leveled at the present act. Still they would be apportionments and not nullities.

Mr. NELSON. If I understand, you concede the jurisdiction of Congress, and you also concede their right to lay down the constitutional requirements, and to say whether or not the discretion of the legislature has been overstepped, and that in this case, therefore, we would have the right to look into it and say whether or not there had been such a gross violation as to make the act a nullity.

Mr. SAUNDERS. Certainly the committee would have the right to look into the case, but it is quite another matter whether they would interfere. As a part of your inquiry you could look to the map of the Virginia districts and compare them with the districts in other States. If upon comparison you ascertain that the other States have districts in the contemplation of the constitution, it would be difficult for the committee to say that the Virginia apportionment was a nullity.

So long as the Virginia districts resemble in a general way the districts of other States, how can you say there has been no apportionment in that State? Until you have reached the point that you can affirm in positive terms, upon an inspection of our districts, that they are not districts at all, that as compared with the standards afforded in other States they are nullities, you are far short of legal authority to avoid the act of 1908. I say legal authority to avoid, for I presume that this committee, in construing the constitution of Virginia, will adopt the construction furnished by our court of last resort.

Mr. Chairman, I have had in mind, for further answer, the question when an apportionment, under the principle of cases like Carter *v.* Rice, would cease to be merely a vicious and unholy gerrymander and become a nullity. The dividing line is incapable of establishment, but it is evident from the terms in which the principle is stated that it is a long road through every variety of bad and unjust apportionments before a nullity is reached.

In Virginia a court is empowered to set aside the verdict of a jury whenever the evidence which supports it, in the judgment of the court, may be fairly styled "no evidence." It is not sufficient for that evidence to be merely inadequate or insufficient, in the court's opinion, to justify interference.

Under the operation of this rule many verdicts are severely criticised, but comparatively few are set aside. The courts content themselves with saying either in terms that the verdicts are supported by insufficient evidence or else are not such verdicts as they would have rendered if the cases had been submitted to them for decision. In these cases, as in the apportionment cases, mere dissatisfaction with what has been done, however strongly it may be felt or expressed, is not sufficient to justify interference.

I will now take up the question of contiguity of the counties in the fifth district. Our friend Governor Montague evidently confounded continuity and contiguity. He seemed to think if one had to go around a mountain range to get from one county into another, that the counties were not contiguous. Two counties might lie broadside for a hundred miles, separated by an impassable mountain range. Still they would be contiguous. The fact of contiguity would not be affected by the intervening barrier to easy communication.

Why is the formation of a district unconstitutional because the most convenient road from one county to another in the same district passes through a county in another district? What difference does this make? I notice that contestant has taken evidence to show that in order to go from Patrick County into Carroll County it would be necessary to go through Floyd County, and this in the face of the fact that Patrick and Carroll join for many miles, as will be seen by consulting the map. It is not my recollection that in going from Patrick into Carroll it is necessary to pass through Floyd, and I have often traveled that road. I have the postal map here, and the committee will note that if this road touches Floyd at all it is only to the most insignificant extent. It looks as if it might be the dividing line between the counties, though it may run through a corner of Floyd for an inconsiderable distance. Thus you can see that the suggestion that the highway from Patrick to Carroll passes through Floyd possesses no significance. But what if it traversed the entire county of Floyd? There are many districts in the United States in which the most speedy and convenient mode of access from one section of the same to another is through a second district. Look, for instance, at the Twenty-third Illinois district. In order to get from one side of the district to the other, say from Wabash County to Jefferson County, a traveler would have to go across Edwards and Wayne, in the Twenty-fourth district, or else have to travel around Robin Hood's barn to reach the same destination and keep in the Twenty-third district. So in the Twenty-second district, an inhabitant of Washington County would find the direct road to Bond through Clinton, which is in the Twenty-third. It is a new principle of constitutionality that districts must be so constructed that the most convenient roads from one section of the same district to another must be confined to the district. I file the maps of Pennsylvania, Alabama, Illinois, and West Virginia in this connection.

They will be found in the Congressional Directory for January, 1910. On yesterday the chairman of the committee called Governor Montague's attention to a considerable disparity in population between the congressional districts of one of the States, I think it was his own, and asked him what he would recommend to be done or what course was proper to be pursued on the part of Congress in such a situation. What was his answer? He hesitated a little, as if he realized that the inquiry opened up a large situation, but having taken a position which involved a certain logical sequence, he recognized that he had to go forward to be consistent, so he replied: "I do not know whose toes I am treading on, but the case suggested, according to the rule I have laid down, of conformity to the unit, requires action on the part of Congress." According to that contention, the district represented by the chairman is an unconstitutional district to-day, because it is a greater departure from the population unit than the Fifth Virginia. It is a smaller district. So with respect to numberless districts in other States. They call loudly for rectification. Does anyone suppose that these differences of population can not be rectified by the legislatures of the several States if they are imperatively required to construct the districts so that each one will represent the closest possible approach to the unit of population? No one will deny that this can be done; but is Congress ready to impose this requirement? Is Congress prepared to avoid all the districts in which gross disparities exist, disparities far greater than are found in Virginia? If not, why should my district and my State be selected for exclusive punishment? I can not understand the proposition that my district would have been a constitutional creation if established in its present form by the act of 1906, but is an unconstitutional gerrymander under the act of 1908. I suppose it is a sort of application of the principle that you can not take two bites at a cherry.

Now, one further proposition. I stated heretofore that the element of party advantage is never absent from congressional apportionments; but so long as the lawmaking bodies keep within their constitutional authority this element does not furnish ground of avoidance. Governor Montague has rested his case on a question of power, and I have undertaken to meet him on that ground. I am perfectly willing to admit, as a consequence of that contention, that when contestant and his friends secure control of Virginia, as they may readily do in the course of years if their principles appeal to our people, another rearrangement of districts will be made in the State, which will be fully as constitutional as the present one. In making that apportionment the winners will not be unmindful of party advantage. When that takes place we will submit our grievances to that supreme tribunal of the State, the people of Virginia. Has the Congress of the United States exhibited any unwillingness to perpetrate a gerrymander when opportunity offered? Take the case of Oklahoma. The enabling act of that State, by some mere chance, shall we say, established a most scientific arrangement of the districts, with large disparities of population. In addition, the counties were so intelligently grouped that in one district the Democratic majority was about 25,000. The Fifth Oklahoma District has a population of 315,000, and the second a population of 225,000; difference, 90,000. Will Congress undertake to forbid the States to exercise an authority which it exercises to the limit when the opportunity is presented?

If gerrymandering by the States is an evil that calls for remedy, is Congress the body to furnish that remedy? What guaranty is afforded that the remedy will not be worse than the disease? But if Congress is to undertake this rôle, the work should be in a large way and not by tentative and capricious applications of the corrective principle. Congress should announce to the States as a whole that they must rearrange their districts in absolute conformity to the rule of compactness and population, and unless this is done Congress itself will establish the districts in every State and so arrange them that they will be free from inequalities and irregularities, whether of population or of outline. This would be a grave departure from the existing policy of acquiescence in the apportionments established by the States and precisely contrary to the course recommended by Davidson *v.* Gilbert, but at least it would be an effort to make a general application of a universal rule. Until this is done it would certainly be a hardship to select for punishment the arrangement of some particular State that is not as bad as the existing arrangements in many other States. But would the problem of just apportionments be solved by displacing the States in the exercise of this authority and lodging it exclusively in Congress?

Senator Thurston asked me on yesterday whether I conceded the right of Congress to establish the districts in the States and fix their delimitations. My reply was that the power has been asserted, has been gravely questioned, and so far as I am aware has never been authoritatively settled. But I submit to the committee that conceding that Congress has the right to arrange the districts within the States, it has never done this, so that the apportionment act is merely commendatory. Hence the states exercise the untrammeled right to make apportionments, and it is not competent to one division of Congress to seek by indirection to exercise the power to control the make-up of districts within the States. If it is a sound contention that the Members of Congress represent the States and not the districts, then unquestionably the make-up of the districts is an immaterial matter. I wish to call the attention of the committee to the case of Pool *v.* Skinner, which is the latest case, so far as I am aware, to announce the position that the constitution seems to regard the Members of the House as representatives of the States rather than of the districts. I have not undertaken in any connected way to establish the proposition that Congress does not possess the power to establish the districts within the States as a supreme exercise of constitutional authority, but have been content in that connection to refer the committee to the case of Davidson *v.* Gilbert, which denies that such a power exists. Here is what Pool *v.* Skinner says:

> The Constitution seems to treat Members of the House as Representatives of the States, and not of districts merely; and the States have the right to determine what portion of their people shall choose these Representatives, subject only to the last apportionment act of Congress. (Hines, vol. 1, p. 175.)

The apportionment act of 1901, in allowing the States to elect Representatives at large throughout the entire census period is a quasi recognition of the principle that the Representatives represent the State and not the segregated districts. If it is a constitutional right to require that the States should apportion themselves into districts, why is it that Congress has not imperatively required Colorado and Connecticut to make their apportionments, so as to elect all of their

Members by districts? Look to Connecticut, where the Member at large has a constituency of over 900,000, while the population of another district is a little over 129,000. Why is such an inequality permitted by Congress, if it is vital that the population of the districts should approach as nearly as possible to the unit? Look to the State of Colorado, with a population of 240,000 in one district and 540,000 in another, a repetition of the inequality that exists in Connecticut. Why are these inequalities permitted? The statute prescribes that the Members shall be elected by districts. Why is a saving clause inserted for the benefit of States which can as readily make the necessary apportionments as other States?

Mr. THURSTON. That is in strict accordance with the act of Congress.

Mr. SAUNDERS. That may be, but why should Congress permit one State or States to have Representatives at large, and at the same time undertake to interfere with the details of apportionments in other States? The above States have had ample time within which to make the necessary apportionments.

Mr. THURSTON. They have not done so.

Mr. SAUNDERS. They ought to.

Mr. THURSTON. Congress says that until they do it, the extra Member shall be elected by the State at large.

Mr. NELSON. They may be violating it according to the last census, but did not they change the statute so as to escape that?

Mr. SAUNDERS. Possibly they did. But Congress should either lay down the law to the States, and prescribe the districts by one sweeping and inclusive act, or else continue the present policy of noninterference which has endured for over one hundred years. Now, I think, Mr. Chairman, that is all I wish to say in this connection. I suppose that Governor Montague was retained to argue this case because he vetoed the act of 1902. If Governor Montague did not approve that act, which was a very different one from the act in issue, then it was certainly within his power to veto it, but I wish to remind you that the Governor's relation to an act in contemplation which is submitted to him for approval is very different from the attitude of this committee toward a completed act. So long as the act was in an inchoate state, so to say, the Governor very properly could have in mind a number of things which do not enter into the considerations of the committee, which is dealing with the present constitutionality of a completed act. If the Governor thought the act submitted was unfair or unjust, or if its motives and purposes did not appeal to him, it was perfectly competent for him to veto it. But if Governor Montague considered that the act of 1902 was a proper subject of veto, it is evident that Governor Swanson, a lawyer, did not entertain that opinion of the act of 1908, for he signed it, thereby rendering it a completed exercise of legislative discretion. If it is a question of citing governors as authority, I will go further. Not only do I oppose the opinion of Governor Swanson on the act of 1908, to the opinion of Governor Montague, who had no occasion to pass on it, but I will throw in the balance the opinion of Governor Mann, now governor of Virginia, and one of the best lawyers in the State, who not only reported this bill from his committee, but defended its constitutionality on the floor of the senate, and voted for it on its passage. But all of this may be fairly styled a sort of side issue.

The CHAIRMAN. Do you know whether the people in Floyd County requested to be taken out of the Fifth Congressional District?

Mr. SAUNDERS. I do not suppose that they did so request any more than the people in Davidson's district requested to be transferred to another district. I have no idea that they did. It is a rare occurrence that the counties ask to be transferred from one district to another.

The CHAIRMAN. Do you think as a matter of justice that congressional districts ought to be formed solely for political purposes?

Mr. SAUNDERS. As a moral proposition, no, I do not. But it is not conceded that this transfer was exclusively for political considerations, though if it was that would not affect the question of power.

The CHAIRMAN. Were there are any reasons assigned at the time of this change?

Mr. SAUNDERS. If I could present to this committee the actual conditions in that district, I do not doubt that I could satisfy you that there were good reasons for the act, though I do not deny that political considerations entered into the legislative motives for the change. But no evidence was, or could be, taken on that line. If this matter had been submitted to the courts of Virginia, they would not have entered upon an inquiry into the motives of the legislature.

This committee, in the view of contestant, and I agree with him, stands in the relation of a court to this inquiry. Hence, it would not be proper to take evidence as to the motives of the general assembly in passing the act.

The CHAIRMAN. Why not?

Mr. SAUNDERS. Because it would inevitably run into an inquiry into political conditions, which would be insisted upon by contestant as the real impelling motive.

The CHAIRMAN. I am not going into the political view of it. Why can you not go into the question as to why any portion of a particular district ought to be taken out of that particular district?

Mr. SAUNDERS. So far as the county of Floyd is concerned, it was in the interest of that county, in a business way, to be transferred to the sixth district.

The CHAIRMAN. To the Sixth district?

Mr. SAUNDERS. Yes; because all her commercial interests are with that district and all her trade lines run in that direction. It trades with Christiansburg and Roanoke, which are in the Sixth District. It reaches the railroad in that direction, while it is cut off from Franklin by high mountains. An inspection of the map will show all this to be true.

Mr. NELSON. A community of interest?

Mr. SAUNDERS. Yes. But while not evading any issue that may be raised, I did not expect to take up what may be called the moral features of the case. They have not been considered relevant in other cases as a determining factor in arriving at a conclusion on the constitutional questions presented.

Mr. NELSON. I should think it would be very much in point.

Mr. SAUNDERS. If you want me to take up that feature of the case I will do so. But I will have to state a hypothetical case, as there is no evidence on this line in the record.

Mr. NELSON. The charge is this—a gerrymander for political purposes.

Mr. SAUNDERS. Yes; that is charged.

Mr. NELSON. If there are other good purposes that could be set forth that, it appears to me, would tend in some way to meet that.

Mr. SAUNDERS. It might be conceded that the change was largely due to political considerations. It might even be conceded that it was entirely due to political considerations, though that is not conceded. But, if so, what difference would it make if Virginia had authority to pass the act? The arrangements of congressional districts by a party legislature are generally related to political purposes, but political purposes are not necessarily vicious or immoral purposes. I might admit that this was a gerrymander pure and simple without altering the strength of my position.

Mr. NELSON. Do you wish to take that position?

Mr. SAUNDERS. It is not necessary for me to take that position.

Mr. NELSON. I wish to ask this question in order to understand your position. Do you justify gerrymanders on the ground that you can not meet them—that is, that Congress can not meet them?

Mr. SAUNDERS. It is not a question of justifying gerrymanders on moral grounds, but of determining whether the State possesses the constitutional authority to effect gerrymanders. There is the further question whether Congress should interfere with the States in the construction of their districts, conceding that it possesses the right of interference. It is a grave question, admitting all that may be said against gerrymanders, whether the gerrymanders of the States, which are severally under different political control, are not preferable to such a gerrymander as Congress could effect, one that would be coextensive with the limits of our country. As Davidson *v.* Gilbert points out, the present system at least works out a sort of rough equality. An excess of inequality in one State is counterbalanced by a like excess in a different direction in another. The legislation of 1908 was fully considered in the Virginia legislature, and while the inevitable political motive was present there were other considerations. A legislature considers many things with which a court has nothing to do and which it can never know. This was fully pointed out in the dissenting opinion in the Wisconsin case.

> The legislative discretion is a wide one. They may consider things such as community of interest, facility of communication, the general topography, the rapidity with which population is increasing, and many other things with which the court has nothing to do and which it can not know. This court can not take evidence as to these outside considerations. (83 Wis., 169.)

This is what the court says, and yet it is insisted that I should take up these outside matters before this committee, which is sitting as a court. Further:

> This court can not take evidence as to these outside considerations, but I have no doubt of the power of the legislature to do so in the exercise of its discretion.

Governor Montague insists that this case should be considered in the light of the judicial authorities. Agreed. But our friend seems to forget that on the question of interference with legislative apportionments there are more authorities in favor of my view than there are to be found on his side, and that one of these decisions is from our State, interpreting our own constitution on one of the precise points in issue. Apart from the other persuasive authorities, is he

unwilling to follow his own court or to recognize its controlling force in the interpretation of the laws of Virginia? In apparent ignorance that the supreme court of Virginia had spoken on this subject, contestant announced in his brief on page 11 that Congress is the court in this matter. But when a federal court construes the laws of a State, whether organic or statutory, it follows the construction of the laws announced by the highest court of that State. Looking, therefore, to the law of 1908 from a judicial standpoint, this committee will presume that the law was passed under proper motives, which are neither to be impugned nor assailed. All the presumptions are in favor of the act. There are certain established rules which fix and determine the attitude of courts when an inquiry is threatened into legislative motives or an assault is made upon legislative enactments.

Courts can not inquire into the motives which may have moved a legislature to enact a statute, making an apportionment of senatorial districts in the manner in which it was made, such motives being presumed to be patriotic. (155 Ill., 541.)

Courts can not inquire into legislative motives. They must assume that legislative discretion has been properly exercised. (Id., 455.) A law will be upheld unless its unconstitutionality is so clear as to leave doubt on the subject. (Cooley's Constitutional Limitations, 216.) It must be assumed by the courts that the legislative discretion has been properly exercised. (Cooley, p. 220.) If any special finding was necessary to justify the passage of a particular act, it would seem that the passage of the act itself might be held to be equivalent to such finding. (Cooley, id., and notes.) We are not at liberty to inquire into the motives of the legislature. (7 Wallace, 506.) Before a court may determine that an act of the legislature is unconstitutional and void, a case must be presented in which there is no reasonable doubt. (135 N. Y., 473.)

Mr. TOU VELLE. Will it bother you if I ask you a question?

Mr. SAUNDERS. Not at all.

Mr. TOU VELLE. When a county is taken out of a district and the district is still left, practically, even between the two predominant parties, would you say it was a gerrymander for political purposes?

Mr. SAUNDERS. Well, I think the members of the committee can very readily answer that question. I leave its determination with them.

The next contention made before this committee is with reference to the candidate, Elliott Mathew. Contestant asserts that his name, though on the ballot, is a nullity. That while it is actually and visibly there, it is not there—a case of "now you see it, and now you don't"—or, rather, you don't see it, and it isn't there. He asserts, further, that if a voter marked off the name of Saunders he voted for Parsons, though he failed to mark out the name of Mathew; that Mathew was ineligible to hold office in Virginia, and therefore he could not be a candidate for Congress. Hence, his name on the ballot was a nullity. Qualifications to hold office in Virginia is one thing, and qualifications to be a Member of Congress of the United States is another and very different thing. How can the declarations, either of the organic or statutory laws of a State, affect the constitutional qualifications of a man to sit in Congress? The constitution of Virginia provides that a man who has fought a duel can not hold office in Virginia. Hence, if contestant's

position that a man who is disqualified to hold office by the constitution of a State is disqualified to sit in Congress is well taken, it follows that a man who fought a duel in Virginia twenty years ago is thereby incapacitated to run for Congress, and if through a mistake of the secretary of the Commonwealth his name is printed as a candidate that name may be treated as a nullity, with all the consequences that would thereby ensue.

The CHAIRMAN. Suppose Mathew had a majority in that district and you were here contesting his right to a seat here. Don't you think Congress would give you the seat?

Mr. SAUNDERS. Not necessarily. For many years one of the districts in the State of Virginia was represented by an illustrious gentleman——

The CHAIRMAN. Suppose you were here as a contestant, having had the next highest number of votes, and Mr. Mathew under the law of your State could not be elected to Congress because he was not qualified under the laws of the State, but he obtained a majority of the votes cast in the district. You came up here contesting his right to a seat for the reason that he was not qualified under the laws of your State to be elected to Congress, and the further fact that he was not qualified because he was adjudged a lunatic and is still adjudged a lunatic, and you came up here and contested his right to the seat. He was in an insane asylum and could not be here. He was represented by Senator Thurston as counsel and therefore was here presenting his claim, and you were here as a contestant. Don't you think that this committee would recommend to Congress that you be seated?

Mr. SAUNDERS. There are two difficulties in the way. In the first place if they ascertained that he could not take his seat on account of disability, Congress has expressly held that the other candidate can not be seated.

Mr. NELSON. That is squarely the rule.

The CHAIRMAN. Suppose he was ineligible to office?

Mr. SAUNDERS. That is the very thing that is claimed, that he has a disqualification that makes him ineligible.

The CHAIRMAN. And suppose you were taking the same position that Mr. Parsons occupies in this case, that his name was not on the ballot as a matter of fact, that it was a nullity in law just the same as the act of a dead man; you are contesting on the ground his name was not on the ballot and he did not get any votes. You are here asking to be seated in Congress.

Mr. SAUNDERS. If my opponent was unseated on the ground of disqualification, on the ground that he was not entitled to his seat, that would not give me the seat.

The CHAIRMAN. I am putting it on the ground that the gentlemen here are putting their claims, that this man's name is not on the ballot, and therefore any vote cast for Mr. Mathew was a nullity and ought not to be counted.

Mr. SAUNDERS. If a man's name was not on a ballot in any real sense, that would present another proposition. But take another case. Suppose the electors of a district write a man's name on the ballots and elect him, though a lunatic. What then?

The CHAIRMAN. I do not think they could elect him then; he was not qualified.

Mr. SAUNDERS. When he came here to assert his claim, with a certificate as a Member of Congress, he would be entitled to a hearing. The House would inquire into his claim. A contest might unseat him, but would not seat the contestant. The latter, like Samson, might destroy his adversary, but he would be involved in the ruin.

The CHAIRMAN. Unfortunately, he could not come, however.

Mr. SAUNDERS. One of the districts in Virginia was represented for years by a lunatic. He was one of the most distinguished Members of Congress that we have ever had. Subsequently his will was set aside by our Supreme Court, on the ground of insanity.

The CHAIRMAN. Was he adjudged a lunatic?

Mr. SAUNDERS. No; but a judgment of lunacy, so far as this House is concerned, would not limit its right to hear and determine.

Mr. KORBLY. Would not the very contest raise a question of doubt?

Mr. SAUNDERS. Certainly. The House is not barred from inquiry by any sort of judgment that may be entered in any State, so far as it relates to the qualifications of a Member.

Mr. CARRICO. If the electors should have written Matthews's name on the ballot and it was shown that he was adjudged a lunatic, would his name then have been just as much a nullity as if it had been printed there?

Mr. SAUNDERS. I am very glad that you take that position. If it is not a nullity when written, it is not a nullity when it is printed. I hope you will stand to that.

Mr. THURSTON. There is this distinction: If an elector writes a name on a ballot—if it is that of an infant or a dead man or anything else—it is an express disclaimer of his purpose to vote for anybody else for that office.

Mr. SAUNDERS. Not necessarily. I will show you that you are mistaken in that. If there was a name on the ballot, and you added in writing the name of a lunatic, the ballot would be void under the Virginia law. You would not vote for the lunatic, and you would not vote for the other candidate.

Mr. THURSTON. That is what I say.

Mr. SAUNDERS. That is not because one man is a lunatic, but because there are two names on the ballot. But according to your theory, the name of a lunatic on a ballot is a nullity, and you would vote for the other candidate whose name was already there. That is the inevitable sequence from your theory. If you hold that a lunatic's name is a nullity, whether printed or written, then when you add a written nullity to the ballot, nothing is really added. But Matthews's name was on the ballot. It had been impressed by physical agencies, so that the voter had to take notice of it. If he wanted it off, he was required to use physical agencies to remove it.

Mr. THURSTON. My proposition is, it is not a nullity, because the writing in of a lunatic's name together with another name which is not scratched out does not make it a nullity. It is a nullity because the writing in of another name is an express disclaimer of an intention to vote for the printed name on the ballot.

Mr. SAUNDERS. If the name is a nullity, how can it express an intention? You can not express an intention by a nullity. You can not do that. A nullity can not express an intention. It has no effect whatever.

The CHAIRMAN. It has this effect; it destroys the ballot, and it is not a vote.

Mr. SAUNDERS. But only because a name is added. If the name is a nullity, nothing is added.

The CHAIRMAN. In effect it destroys the ballot, by the very fact that I write a name on the ballot of a person whose name is not on the list. I think, like Mr. Thurston, that is an expression on my part that I am not satisfied with either of the candidates on there, and I intend to show my dissatisfaction by writing the name of somebody else. I know at the time that the vote will go out.

Mr. NELSON. Are you going to discuss the question of showing the intent of the voter?

Mr. SAUNDERS. Certainly.

Mr. NELSON. Then I will not interrupt you now.

Mr. SAUNDERS. If a voter finds the name of one candidate on his ballot, and adds the name of a lunatic, he performs an act of intelligent volition. If he leaves two names on his ballot, the law avoids that ballot on the ground that no choice has been indicated. If the same voter finds three names on his ballot, and scratching out one, leaves the other two, he has again performed an act of intelligent volition. He must be presumed to have intended to do that which he did. As a matter of fact he did not vote. It will be presumed that he did not intend to vote. His action indicated that he intended both of the unscratched names to remain on his ballot.

The CHAIRMAN. Maybe that counts because fifteen or twenty people left the name of Mathew on. They were not satisfied with either Parsons or Saunders.

Mr. SAUNDERS. That is the contention which I make and which is supported by the ballots themselves, that those voters when they marked out Saunders or Parsons thereby indicated by a positive act that they did not want to vote for them, but this act did not indicate an intention to vote for anyone else. On the contrary, the voters indicated an utter indifference toward the remaining candidates by leaving two names on the ballot; just as many voters indicated their indifference by leaving three names. The committee would reject these ballots, even if the statute did not expressly avoid them.

The CHAIRMAN. Here is what I would like to hear you on. What is your position in answer to one authority cited here, I think by Governor Montague, where the courts have held that in the case of a man who is a lunatic, whatever acts are performed by him are a nullity, just the same as the act of a dead man—that it is not any act at all and has no legal effect? What do you say in answer to that?

Mr. SAUNDERS. I am going to take that up, as well as other matters covered by the questions which have been propounded to me.

The CHAIRMAN. And whether it was a nullity.

Mr. SAUNDERS. The name was not a nullity. It was properly on the ballot, and the authorities that they cite in relation to the acts of a lunatic in matters of contract have no sort of relation to the individual acts of a lunatic affecting only himself and not designed to create an obligation to another party.

You can not say that if a lunatic should arrange for the printing and distribution of his own ballots, as was formerly done in my State by the candidates, such ballots would be void, merely because they carried the name of a lunatic. One of the Members of Congress from

Virginia for many years had a lunatic to run against him each time that he made a race. The same lunatic, I think, was a candidate for governor in my State. Were this man's ballots void per se, merely because a lunatic paid for their printing and distribution? A lunatic could not enter into a binding contract with a printer on which the printer could recover, but if a printer printed his ballots pursuant to contract and was paid therefor by the lunatic, the ballots are a physical fact. They are not a nullity.

Mr. NELSON. Here are 15 ballots, I think it was 15 ballots, cast for Mathew, that evince a purpose on the part of 15 men not to vote for either Parsons or Saunders. How are we to know in settling these ballots whether those who voted for Saunders and left Mathew and Parsons out did not overlook striking Parsons as well as Mathew out?

Mr. SAUNDERS. Yes.

Mr. NELSON. I mean that they did not have the same purpose in mind for not voting for either.

Mr. SAUNDERS. That may have been; so it is all a matter of guesswork.

Mr. NELSON. We would have to guess, would we not?

Mr. SAUNDERS. Yes, if you undertook to arrive at the intention of the voter apart from what he actually did to indicate his intention. But our statute provides that when the names of two candidates for the same office are left on the ballot that ballot is void.

The Virginia law does not permit any guessing to be done. This House has frequently decided that when a ballot is required to be prepared in a particular way, in order for the same to be a legal ballot, pursuant to the laws of a State, whatever the requirements of those laws may be, whether reasonable or unreasonable, those requirements must be complied with or the ballot will be void. In other words, the House will follow the local law. I have abundant authority for that proposition.

Now, I will take up another feature of this case. I wish to propound to my opponent this inquiry. How can the provisions of the organic law of Virginia prescribe disqualifications for membership in Congress? How can Virginia undertake to say who shall and who shall not be eligible to a body which is invested by the paramount law with the exclusive right to pass on the qualifications and returns of its members? The provisions of our constitution must be construed to relate to state officials, for the qualifications of a member of Congress are beyond its purview. Is not that a sound proposition? If it is not, why not? The State of Virginia provides that a man who has fought a duel shall not hold office in that State. This provision is in the same section of the constitution which relates to lunatics, and if it is effective for the one class it will be effective for the other. Would any member of this committee undertake to say that a man who had fought a duel in Virginia would thereby be rendered ineligible to a seat in this body? This House is indifferent to disqualifications sought to be established by the States. The Constitution has fixed the qualifications of a member of the House of Representatives. Here they are:

> No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen. (Art. 1, sec. 2.)

And that is all. It is a question unnecessary to be discussed in this connection, whether Congress itself can add to these disqualifications. In respect to crime, it has been held that Congress could provide additional disqualifications.

Mr. KORBLY. It is not even necessary that a candidate for Congress should live in the district that elects him.

Mr. SAUNDERS. Oh, no. In the famous Brigham Roberts case it was held that Congress could establish disqualifications, and as a result of that opinion on the part of the House, though it was stoutly maintained that Mr. Roberts was entitled to his seat under the Constitution, he was excluded by an overwhelming vote. But there was weighty authority on the side of those who maintained that he was entitled to be seated. However, it is no longer an open question that the States can not impose disqualifications on membership in Congress. While the statement of qualifications in the Constitution is in the negative form it has been held to be equivalent to the affirmative proposition that any man who has those qualifications can not be disqualified by the State so as to prevent his becoming a Member of the Congress of the United States.

Let me submit to the committee volume 1 of Hines, which is very much in point on this matter, and will eliminate from this case any question of disqualification. (See p. 384). Mark you, Mr. Chairman, I do not wish to be understood as saying that a lunatic has an absolute right to sit in Congress and that the House is powerless to deal with such a case. I merely say that his case is one that the House must deal with on proper inquiry. So far as the State of Virginia and the provisions of her organic law are concerned, the disqualifications for lunacy and for fighting a duel are put on the same footing and included in the same section. If the one must be left for the determination of the House on a contest, so must the other.

The CHAIRMAN. What would you say as to the right of a lunatic to have his name printed on a ballot under your Virginia law?

Mr. SAUNDERS. He has a right to have it done, because the law of the State can not hinder him from taking the steps which will enable him in case of election to present his claims to the House and have a final determination of his qualifications. The State is empowered to fix the qualifications of the electors who vote for a Member of Congress, but not to prescribe qualifications for the candidate himself or hinder him from being a candidate.

Take again the case of an admitted felon who offers as a candidate for Congress and forwards a proper notice. Could the secretary of the Commonwealth refuse to put his name on the ballot?

Mr. CARRICO. If you can not make any legal contracts?

Mr. SAUNDERS. It is not a question of making legal contracts.

Mr. CARRICO. How can he serve the secretary of the Commonwealth notice of his intentions to become a candidate?

Mr. SAUNDERS. That question does not present any difficulty. The notice merely informs the secretary of the fact that the man who signs it will be a candidate. The law says there shall be two witnesses to the notice. But you must bear in mind that these witnesses are not witnesses in the sense of witnesses to a will. They do not decide that the man is of sound mind, or as to his mental qualifications, or anything of the sort. They simply identify the man, so that a fictitious name could not, for political purposes, be sent in. All the

secretary was concerned to know was whether the signature was what it purported to be, the signature of the man Elliott Mathew. If it was his signature, no one can successfully maintain that the signature itself is a nullity.

The CHAIRMAN. You say the object is simply identification?

Mr. SAUNDERS. That is all. The statute is here. I have included it in my analysis.

The CHAIRMAN. If that is true, a man ought to be identified, then, by some one who knew him.

Mr. SAUNDERS. He was.

The CHAIRMAN. One witness testified he never saw this man until the day he asked him to sign that paper, and did not know he was crazy or anything about him.

Mr. SAUNDERS. That may be true, but the man who signed was the man Mathew. There is no doubt of that fact. No question of identity is raised. So, if it was Elliott Mathew who sent in a notice in conformity with the law of the State, the secretary was not at fault in including his name with the other names for the ballot, or for refusing to enter upon an inquiry into his mental state.

The constitution provides that "no person shall be a Representative who shall not have attained the age of twenty-five years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen."

Mr. PARSONS. Suppose he was in the penitentiary at the time instead of the asylum?

Mr. SAUNDERS. Well, suppose he was; but suppose his term would expire before the time to take his seat arrived. The mere fact of present confinement would not affect his qualifications, though it might afford the voters a reason not to vote for him. I believe Wilkes was elected to Parliament while he was in jail. If a constituency chooses to elect, and the House to receive, a member from the penitentiary, the organic law of Virginia could not interpose any obstacles. Your question illustrates a point that I have sought to make, that the disqualification of lunacy, or of felony, must alike be passed on by the House. When you consider Mathew as a candidate for Congress, you must consider the situation with reference to the Federal Constitution, and dismiss the constitution of Virginia from your contemplation.

Mr. PARSONS. It says "any person."

Mr. SAUNDERS. Yes.

Mr. PARSONS. Suppose a man had never——

Mr. SAUNDERS. I will anticipate your question, and admit that there might be a candidacy so preposterous that the secretary of the Commonwealth would be justified in rejecting the name. But even in such a case, if the secretary published the name, the voter would be required to take notice and erase it in order to cast a valid ballot. If the King of England should send in his name as a candidate, we will all agree that the secretary would not put his name on. But we are discussing the case of an adult of good education, who forwarded a sufficient notice of his candidacy. It is true that a friend of mine informed the secretary that he was a lunatic, but the secretary took the position that he was powerless under the law to withhold the name, and in this position he was sustained by the opinion of the attorney-general. His attitude was certainly not intended to help

me, for the request to exclude Mathew from the ballot was preferred by one of my supporters who was so insistent that he carried the matter before the attorney-general. Even if Mathew had been adjudged a lunatic, that finding was not conclusive on the House. Mathew, if elected, would have been entitled to an inquiry from this body to ascertain his qualifications and capacity. That was done in Senator Niles's case. Hence Mathew had the right to be a candidate.

Mr. KORBLY. It would go to show the privileges of the House.

Mr. SAUNDERS. Certainly. That is what I am getting to. Permit me to submit some authority.

Mr. HOWELL. Do I understand your position to be that even though the secretary of the Commonwealth had had full knowledge and information of the character of Elliott Mathew as to his being adjudged insane, that he would then have been compelled or justified in placing his name upon the ballot?

Mr. SAUNDERS. The answer to that query is this: If the secretary of the Commonwealth had no authority to pass upon the qualifications of a Member of Congress, how could he undertake to anticipate the judgment of the House, and say that Mathew could not be a Member of this body? Your question presents no difficulty. The secretary had no more right, per se, to exclude a lunatic from the ballot than he did to exclude a felon or a duelist.

Mr. HOWELL. What is there in the Constitution to prevent a woman sitting as a Member of Congress if Congress should admit her?

Mr. SAUNDERS. The papers state that a woman may be sent to Congress from the State of Colorado. But I wish to insist upon my query. Suppose a duelist forwarded a notice to the secretary that he would be a candidate for Congress, and his opponent by the next mail informed the secretary that he was disqualified by the constitution of Virginia. What would be done in the premises? What would or could the secretary do? What court, state or federal, could undertake to say to this man: You shall not be a candidate for Congress; your name shall not go on the ballot. Or to say to the constituency: You shall not be allowed to vote for him. In our opinion he is disqualified.

Mr. KORBLY. Suppose you turn the case the other way, and the secretary had refused to put his name on the ballot, could he have been compelled by legal process to put him on?

Mr. SAUNDERS. Certainly. There was no political advantage in the secretary's contemplation, because Democrats were asking him to have Mathew eliminated. The only movement to that effect emanated from Democrats who were aware of his alleged insanity, and communicated that fact to the secretary of the Commonwealth, and later to the highest legal officer of the State.

Mr. NELSON. I fail to see why a Democrat would not be as apt to vote wrong as a Republican.

Mr. SAUNDERS. Certainly. There was no reason for any Democrat to encourage Mathew to become a candidate, though the notice alleges that his candidacy was the product of a Democratic conspiracy. This is one of the many charges of the notice which contestant has failed to establish.

Mr. CARRICO. You say the secretary of the Commonwealth has no discretion in such matters?

Mr. SAUNDERS. With respect to a case that in the result must be passed on by the House of Representatives when any real question is involved, I affirm that he has no discretion—that he is a purely ministerial officer.

Mr. CARRICO. Then you say Congress has never decided a woman can sit in the Congress of the United States——

Mr. SAUNDERS. I understand the voters propose to send a woman from Colorado——

Mr. CARRICO. Still you say the secretary of the commonwealth would have discretion and would not place the woman's name on the ticket.

Mr. SAUNDERS. I do not think I said that. I say that there are some cases, never likely to arise, but in which, should they arise, the secretary, by a sort of tour de force, would withhold the names from the ballot. If the secretary was assured that one of the names was that of a baby two weeks old, or of the Shah of Persia, he would doubtless reject them. The powers of the secretary are discussed in the Record in the deposition of Attorney-General Anderson. If a felon, or duellist, sent in his name, what do you think the secretary ought to do?

Mr. CARRICO. I do not think his name should go on the ticket. I do not think he is eligible to office.

Mr. NELSON. Would not that be a bad precedent to establish as to who should and should not be qualified for election to Congress?

Mr. SAUNDERS. It would be a fatal thing to confer such a power upon the States, or upon any functionary of the States. Congress has distinctly ruled that a State can not impose disqualifications upon a Member of Congress. It would be in derogation of the constitutional rights and functions of this House for a court in Virginia to undertake to keep citizens from being candidates for Congress on the ground that they are disqualified to hold office by virtue of the Virginia constitution or laws.

Mr. HOWELL. I understand the point to be that a lunatic can not declare his intention to come to Congress.

Mr. SAUNDERS. Why not? There is no authority to that effect. A lunatic sat in this House, and the people of his district elected him. That is within the last ten years. He pleaded insanity to a criminal prosecution and was acquitted on that ground.

Mr. THURSTON. That is never held to be evidence of continuing insanity except in certain States whose laws provide for commitment.

Mr. SAUNDERS. If you put in a plea of insanity, and it is sustained, there is a presumption that the insanity will continue.

Mr. NELSON. This man had been adjudged insane from time to time, had he not, and then let out again?

Mr. SAUNDERS. He comes from my county, and as a young man was an ambitious fellow. At one time he was a candidate for superintendent of schools. Finally he became insane. Doubtless he had the disease which Secretary Knox imputed to Glavis, megalomania, or "bighead," as it is popularly styled. Some years ago he was sent to the asylum. At times he improved and was let out on furlough. His insanity was recurrent. When his trouble returned the authorities would send for him. During the summer of 1908 he was at large. Doubtless walked off as he had the opportunity to do, and the authorities, knowing he was harmless, made no effort to ap-

prehend him. While at home he became a candidate for Congress and in due course sent in his notice. That is the whole story.

The CHAIRMAN. But he was apprehended?

Mr. SAUNDERS. Yes, sir.

The CHAIRMAN. Just after he sent in this letter?

Mr. SAUNDERS. Yes, sir.

The CHAIRMAN. And he was put in the asylum and has been confined there ever since?

Mr. SAUNDERS. There is no evidence to that effect.

The CHAIRMAN. But the record shows he was in there at the time of the election?

Mr. SAUNDERS. Yes, sir.

Mr. CARRICO. At the time of the taking of this testimony he was still there?

Mr. SAUNDERS. Yes.

Mr. THURSTON. In order that I may get your view fully, suppose a man sends in his request to go on the ballot and says in that request "I am a subject of Great Britain," or if a man sends in that request and says on that request "I am an adjudged lunatic," or he says on that request "I am a convict in the state penitentiary," or says on that request "I am a minor under 21 years of age," or says on that request "I am a woman," would the secretary of state in those instances be compelled to put that name on the ballot?

Mr. SAUNDERS. I will answer all those questions seriatim. Suppose a candidate sent in his notice and added the statement "I am a felon," what would the secretary of the Commonwealth do?

Mr. THURSTON. Well, under your position he would have to put him on.

Mr. SAUNDERS. Don't you think so?

Mr. THURSTON. No.

Mr. SAUNDERS. I affirm again that there is nothing in the constitution which says, because a man has been convicted of felony in a state court, he is disqualified to be elected to Congress.

Mr. THURSTON. I will tell you my contention: Where the law provides, any person may send in this notice to the secretary of the commonwealth; the word "person" in your law, read in connection with your constitution and your other laws, means and means only, and can mean only, a person qualified to run for that particular office.

Mr. SAUNDERS. Suppose the law means that; I will take up that proposition. If our law meant to say that persons qualified to be Members of Congress under the Constitution of the United States, but disqualified to hold office under the local law, should not be candidates for Congress, then on that point our law would be a nullity.

Mr. TOU VELLE. Taking that proposition, who would be the judge of their qualifications?

Mr. SAUNDERS. But one body in the world, and that is this body.

Mr. TOU VELLE. But what had been done at some place else would be simply evidence.

Mr. SAUNDERS. Certainly. Evidence which this House has held is not binding. Even if that evidence was conclusive in the other jurisdiction, it would not be conclusive so far as the House was concerned, because this House would determine the qualifications of its Members under authority derived from the Constitution of the United States.

Now, I will agree with Senator Thurston's proposition that when the constitution says a felon shall not hold office it means exactly what it says, but it refers to tenure of office in the State of Virginia. It is a strained construction of that instrument to make its provisions relate to the qualifications of a Member of Congress. It is an infringement upon the just authority of this body for a State to provide that its disqualifying laws shall operate, ipso facto, to exclude a candidate from ever reaching this body and presenting his claims to its consideration. Take the case of a man in Virginia who commits a malicious assault. He is a felon by our laws. Still, the minimum punishment in such a case is a fine of $5 and twenty-four hours' confinement in jail. The constitution attaches disqualification to hold office to any conviction of felony, but it is simply absurd to say that such a man would be excluded from the ballot if he sought to be a candidate for Congress. Senator Thurston intimates by his question that a felon of this character, or of any character, should be rejected by the secretary and his name withheld from the local boards which print the tickets, or ballots.

This committee is asked to sustain that contention, by supporting the constitution of Virginia in derogation of the authority and privileges of this body.

The CHAIRMAN. Suppose the secretary of the Commonwealth declined to put Mathew's name on the ballot; how could he get it on?

Mr. SAUNDERS. By mandamus. The application would be made to the appropriate court to require the secretary to perform a ministerial act.

The CHAIRMAN. Would the courts of your State say that a man of that kind was in a condition of mind even to get the consent of his own mind to get his name on the ballot?

Mr. SAUNDERS. They would doubtless rule that it was not proper for them to enter upon an inquiry which belonged to this House, and which it could make without regard to the findings of a state court.

The CHAIRMAN. That is not a question for the courts to consider, and the name would go on the ballot?

Mr. SAUNDERS. The law of Virginia can not provide that a man who aspires to membership in Congress shall not be a candidate. It can not throw obstacles in the way of his exercise of a constitutional right.

Mr. HOWELL. Suppose he had been elected?

Mr. SAUNDERS. Yes.

Mr. HOWELL. Your State has jurisdiction of him; he could not come to Congress.

Mr. SAUNDERS. Well, that merely suggests an inquiry as to the appropriate legal procedure in Virginia to secure the liberty of a man who had been elected to Congress. Of course a man might be so hopelessly insane that no question of election or procedure could ever arise. But a district might well elect a man of disordered mind, a man who, on inquiry, might be ascertained to be non compos in some direction. He would be entitled to have Congress pass on his case, and the House would, doubtless, receive or reject him, according to the extent and character of his mental disorder.

The CHAIRMAN. How could he commence mandamus proceedings under the laws of your State?

Mr. SAUNDERS. By petition to the proper court. This would be a mere matter of appropriate procedure.

But I do not desire this committee to misapprehend my position. I repeat that I do not contend for a moment that a lunatic who happens to hold a certificate of election to Congress can force himself upon the House and compel it to receive him under the provisions of the Constitution. The House is amply able to deal with such a case. My argument goes no further than that it is a case for the House, and not for the local authority. The disability clauses of the state constitution are irrelevant in this connection.

The CHAIRMAN. My question does not get to the question of the qualification of the man to sit in this body, but under the Virginia law there are required certain conditions to get his name on the ballot. First, he has to decide the question whether or not he is to run for Congress.

Mr. SAUNDERS. Yes.

The CHAIRMAN. That is the act of a man who is rational.

Mr. SAUNDERS. Not necessarily. There are some irrational men who have made up their minds to run for Congress. [Laughter.]

The CHAIRMAN. That may be true; I will agree with you on that general proposition. But he is doing certain things now to get his name on the ballot. I say he must decide for himself whether or not he wants to run for Congress. And having so decided, he must do something else; he must perform another rational act.

Mr. SAUNDERS. He performed the necessary act.

The CHAIRMAN. And that is, to write a letter?

Mr. SAUNDERS. He wrote a letter, at least a notice of candidacy, and a well-written one, too, for that matter.

The CHAIRMAN. And then have two persons sign that, vouching for him in some way?

Mr. SAUNDERS. They signed it all right.

The CHAIRMAN. One of them testifies he did not know him and had never seen him before.

Mr. SAUNDERS. That may be, but there is no claim that the identical man Mathew did not sign the notice.

The CHAIRMAN. His letter goes to the secretary of the Commonwealth and the secretary declines to put his name on the ballot?

Mr. SAUNDERS. Yes.

The CHAIRMAN. Do you mean to say you can find a court in the State of Virginia anywhere that would issue a mandamus, knowing the facts, knowing he was adjudged a lunatic, which would issue a writ of mandamus to compel the secretary of state to put his name on the ballot?

Mr. SAUNDERS. Well, I could not undertake to say what a court of Virginia, or of any other State, would do. But this question was not presented to a court.

The CHAIRMAN. I am not a citizen of Virginia, but from my knowledge of jurisprudence in Virginia I do not believe any court in that State would issue a writ of mandamus to compel the secretary of state to put a crazy man's name on the ballot. But I do not think that has anything to do with this.

Mr. SAUNDERS. That is foreign to the case, because there are no such facts in the case. There is no question that Elliott Mathew wrote his notice; there is no question that the man who signed it was Elliott Mathew; there is no question that he actually lodged his notice in the office of the secretary of the Commonwealth of the State of Virginia; there is no question that the ex parte information that Mathew was a lunatic was given to the secretary; and there is no question that this matter was taken up by the attorney-general of Virginia in the course of deliberate inquiry in his office. As a result of that inquiry he advised that Mathew's name should go on the ballot.

Mr. HOWELL. What would you say in the case of a convict who was sentenced for life, and who made application to run for Congress? Would the secretary have to put his name on the ballot?

Mr. SAUNDERS. You can easily ask questions until a point is reached where we would all agree that the secretary ought not to publish a name. I can conceive of such cases, but the secretary of the Commonwealth and the attorney-general did not think that this was such a case. I have asked the question before, and I repeat it, What ought the secretary to do if a felon sent in his name as a candidate for Congress?

Mr. HOWELL. If he is under conviction and sentence?

Mr. SAUNDERS. I am putting the case of a man who enjoys his physical freedom, but who is disqualified for office by the constitution of Virginia. He is under duress of law, so to say. What would you do in such a case?

Mr. HOWELL. As I understand the matter, this Elliott Mathew was not a free man; he was under the control and jurisdiction of the State.

Mr. SAUNDERS. The history of his case shows that his insanity was recurrent.

Mr. HOWELL. He was simply an escaped lunatic.

Mr. SAUNDERS. He was at large at the time, that was true. But what of the case I propound? What would you do in the case of a felon who was absolutely disqualified to hold office by the constitution of Virginia, but who sent in a formal notice that he would be a candidate for Congress?

The CHAIRMAN. Some members of the committee desire to leave promptly at 12 o'clock, and we will ask you to suspend at this point. How much more time do you think you will require?

(After informal discussion.)

The CHAIRMAN. We will close this case to-morrow at 12 o'clock. We will take a recess now until 8 o'clock this evening, and to-night we will ask you to proceed with your statement, during the presentation of which you will not be interrupted; and we hope you will be able to conclude within two hours. Then, to-morrow at 10 o'clock, we will give Mr. Thurston until 12 o'clock, when the case will be concluded.

(Thereupon, at 12 o'clock noon, a recess was taken until 8 o'clock p. m.)

EVENING SESSION.

MARCH 4, 1910.

The committee met at 8 o'clock, pursuant to the taking of recess, Hon. James M. Miller in the chair.

ARGUMENT OF E. W. SAUNDERS, THE CONTESTEE—Continued.

Mr. CHAIRMAN. I desire to file, as persuasive authority on various points touched upon in my remarks of yesterday, the following extracts from the Congressional Globe, volume 20, page 184, in which is discussed the proper attitude of Congress toward apportionments established by the legislative bodies of the several States. The participants in this discussion recognize that the right of the States to make congressional apportionments is derived from article 1, section 4, of the Federal Constitution.

The formation of districts by which elections shall be made is a regulation of the manner of election. (See Globe, 184, Thompson.)

The judge who disregards a general law to relieve a particular evil injures the whole community and usurps legislation.

The existence of the power to remodel districts is one thing; the propriety of its exercise is another.

To give a seat to this contestant is founded on the assertion that this House can correct whatever they think is indiscreet or unfair in the legislative action of a sovereign State.

In these election cases the House acts judicially; its function is exclusively judicial.

It is sometimes loosely supposed that the House possesses a general superintending power over the election of its members, which enables it to dispense with the requisition of the laws by which those elections are regulated, an unlimited discretion which warrants such a determination as may seem equitable, though in conflict with the statutory enactments of the States. This, however, is a most erroneous view of our duty. The Constitution is as obligatory on this House as on any State or private individual. The same instrument which constitutes us judges of election confers on the state legislatures the power to prescribe times, places, and manner of holding elections. When, therefore, the State has made a regulation which it is empowered to make, this regulation must have the force of law and be as binding on this House as on any individual. The power to make or alter them exists in Congress, but not in this House alone. (Globe, 183.)

It is in vain to say that a legislature may prescribe the time, etc., if such prescription is not final, if this House may disregard it whenever it thinks it has been indiscreetly or unjustly exercised.

I said this afternoon, in response to a question propounded to me, that if a Member of this House was unseated for disqualification the candidate receiving the next highest number of votes would not be seated. The House has repeatedly decided that the disqualification of a sitting Member does not entitle contestant who had received the next highest number of votes to take the vacated seat. In support of this proposition I refer to Hinds, volume 1, page 396; also to a later case, Bayley *v.* Barbour, volume 1, page 422; also Hunt *v.* Menard, page 205.

Mr. NELSON. I just happened to be turning to the Constitution and the Hinds annotations to the Constitution, in which he lays down that principle: "Minority not seated when returned Member is disqualified."

Mr. SAUNDERS. The citations are taken from Hinds's Monumental Compendium, or vade-mecum, for the Members of Congress.

This afternoon, Mr. Chairman, I was proceeding to submit authority for the proposition that, so far as the eligibility or qualifications of a

Member of Congress are concerned, no State can affect them by any legislation of its own, whether organic or statutory, whatever its purpose may be or however sweeping or comprehensive the character of its legislation. As a matter of necessity the legislation of a State can operate no further than upon those matters which are subject to its jurisdiction. This statement is an obvious truism.

Now, whatever may be the declarations of the organic law of Virginia with respect to disquliafications, it inevitably follows that its provisions relate to officers who are within the scope and operation of that law. It has no sort of relation or application to candidates whose qualifications are determined by the terms of a higher and paramount law. While this statement is obviously true, Mr. Chairman, I do not wish to be understood as maintaining the further proposition that if a Member elect is affected at the time with lunacy, or if lunacy supervenes, that this House is powerless to deal with such a situation.

I merely wish to get out of the case a confusing element, for the constitution of Virginia is a confusing element in so far as it is cited to establish disqualifications in a candidate for Congress. It possesses no authority in the premises, and I wish to dismiss the same from consideration in order that your attention may be directed to the law which does relate to and fix the qualifications of a member of Congress.

The constitution of Virginia provides that a lunatic is disqualified to vote or to hold office; and further that a felon and a man who has fought a duel with a deadly weapon are likewise disqualified. All of these persons are disqualified by the same section, and while the case of the lunatic seems to impress the members of the committee more forcibly than the case of the other parties, it will be perceived, as a matter of law, that the constitution of Virginia puts all of these disqualified persons upon the same footing of disability. The disqualifications are imposed alike upon the lunatic, the felon, and the duelist, and no distinction whatever is made between them by the provisions of the fundamental law. If there is a disqualification upon a lunatic, a felon, or a duelist to hold office in the Congress, that disqualification must be sought in the Constitution of the United States and not in the constitution and laws of Virginia. Hence, I conclude that as the qualifications of Mathew as a candidate for Congress must be determined by the paramount law of the land and not by the organic law of Virginia, he was properly on the ballot in the election of 1908. The laws of Virginia had no right to exclude him as a candidate for Congress merely because he could not hold office in that State. If my premise is correct, and the House alone can judge of the election and qualifications of its members, then no state law can prescribe that persons who are not disqualified for Congress by the Federal Constitution shall be ineligible to a seat in the House of Representatives or be precluded from being voted for as candidates for that position.

Nothing I am saying now touches upon the question of the right of the Congress or the House to deal with the disqualification of lunacy when a member elect afflicted with that disability presents himself at the bar of the House. I am simply maintaining in this connection that the law of Virginia has no place here, and can have no place, when it undertakes to say that the man Mathew or any other man, who possesses the constitutional requirements, is disqualified to sit in

Congress. What I am now saying is solely intended to eliminate the use of the constitution of my State in aid of contestant's proposition that Mathew had no right to a place on the ballot in the election of 1908.

I take it to be a further fundamental proposition, Mr. Chairman, that when a man under the terms of the Federal Constitution is not disqualified as a candidate for a seat in the House of Representatives no State has the authority by virtue of any provisions of its local laws to forbid one of its citizens from being a candidate for the House of Representatives or to hinder him from finally submitting the question of his qualifications to the judgment of this body.

The States can not undertake to say that a man who is not disqualified by the paramount law shall not present the question of qualifications at the bar of the House, for such action on their part would be the prejudgment of questions exclusively reserved for the decision of this body. The ministerial officers in my State who were asked in an ex parte way to withdraw Mathew's name from the ballot very properly decided that this action was not within their powers.

The secretary of the Commonwealth, when he was informed by my political supporter, W. D. Martin, that Mathew was a lunatic and that his name should be withheld from the ballot, very properly replied that he could not take this step; that he could not pass on Mathew's mental qualifications or hinder him from taking the trial of that issue, if elected, to the House of Representatives; that he could not undertake to say that the electors of the Fifth District should not vote for Mathew or elect him if they saw fit. I do not know how any court in the State of Virginia could undertake to hinder a man not disqualified, save by the laws of Virginia, from being a candidate for, or being voted for, for Congress.

I referred to the fact this afternoon that the disqualification of the lunatic and the disqualification of the duelist is precisely the same under the laws of Virginia. I asked the question if a duelist had been a candidate for Congress in the election of 1908, and had forwarded a proper notice to Richmond, how any court in Virginia, state or federal, would have proceeded to strike his name from the ballot, because he was disqualified to hold office by the constitution of that State. I know of no tribunal that upon a question of qualifications to sit in this body would undertake to forestall this House and to deny to a man the right to be a candidate, and to bring his case before this body, as he would have the right to do, if elected, even if he was affected with the disqualifications imposed by the paramount laws.

It was suggested that Mathew had been adjudged a lunatic. But even if that adjudication was effective in Virginia, it would not be binding upon this body, if a Member-elect who had been adjudged a lunatic wished to contest this finding before the House. This body has declared that even the finding of a court on an issue of fact affecting the qualifications of a Member is not binding on the House of Representatives, which will conduct its own investigations and reach its own conclusions.

Let me cite you to that case.

The committee denied the binding effect of the decision of a territorial court on a question of fact concerning the qualifications of its Delegate. (Hinds, vol. 1, sec. 413.)

An inquiry into the qualifications of Mathew is merely an inquiry of fact, and the secretary of the commonwealth in Virginia very properly passed it up to the House of Representatives. Suppose Mathew had been elected and subsequently had presented himself as a Member-elect at the bar of this House, what would have been its action?

Would this House have undertaken to say, "We can not hear you; you have been adjudged a lunatic, and that adjudication by a Virginia justice of the peace will not be inquired into by this body?" Assuredly the House would have done what the Senate did in the case of Senator Niles, when he was charged with lunacy. A committee would have been appointed, as in any other case of alleged disqualification, and on its inquiry and report the House would have acted. Lunacy in a Member-elect, whether existing at the time of election or supervening at a later period, will not in the absence of inquiry and ascertainment by the House furnish ground for rejection. In other words, lunacy, when ascertained otherwise than by the action of the House, does not operate, ipso facto, to disqualify a Member or cause his rejection.

All of this, Mr. Chairman, is designed to show that any man who is affected merely with a state disqualification has a right to bring his case to this House if he is a candidate. It is not contended that an absolute lunatic, merely because this disqualification is not mentioned in the Constitution, can not be rejected by the House. I hold that the powers of the House are ample in the premises, but it is the House that must deal with the question of disqualification, not a state functionary by anticipation.

The party alleged to be suffering from disqualification can not be hindered from coming here, and if this be true, then Mathew's quoad the House of Representatives was a lawful candidate. If he was a lawful candidate, pursuant to a lawful notice, his name was properly on the ballot.

A lunatic is not ipso facto disqualified to sit in Congress, for it is perfectly conceivable that on inquiry a lunatic might be seated, and certainly the mere suggestion of lunacy, if a man was not dangerous, would not cause his expulsion. It is a question, I may say, of degree and extent.

As I have said before, lunatics have sat in this body. Our State was represented in former years by a member who was notoriously a lunatic at times, and whose will was avoided on that ground by the supreme court of Virginia.

Take two cases, by way of illustration. A raving, dangerous lunatic presents himself, with a certificate of election. He would be promptly rejected. The House having in view its safety and comfort, as well as the public interests, would meet such a man at its threshold and, on inquiry, exclude him. But take another case. Suppose a man presents himself who was affected with some measure of lunacy, a man who was disordered to such an extent that, technically, he would be a lunatic, but who was neither dangerous nor disagreeable. We have all seen such cases. In every community

there are men who could, on occasion, be proven to be lunatics, but who are well equipped in most directions to take care of their interests. They are frequently men of accomplishments, alert, bright, well equipped, but insane on one point. Suppose such a man presented himself with a certificate of election, does anyone suppose that he would be rejected as a matter of course if inquiry showed that he was technically a lunatic?

Take a man who is affected with that form of lunacy known as Spiritualism, an obsession which does not seem to be at all incompatible with the highest form of business sense, and the ability to accumulate property; yet in many instances the courts have set aside the contracts of men of that sort, on the ground that they were lunatics.

Suppose a Spiritualist was elected to this body, would it be contended that on proof of that fact alone, apart from any other features of objection, he would be excluded from membership?

Mr. BENNET. We have a Spiritualist in our body now.

Mr. SAUNDERS. There is another feature of this proposition, showing that the disqualification of lunacy must be inquired into by the House, and that no adjudication in a state court will operate to disqualify a candidate on this ground to the exclusion of the right of inquiry, and final adjudication by this body of the qualifications of its Members. This feature is the right of the constituencies to be represented by candidates of their own choosing, even if mentally disordered.

The House would deal with a disqualification arising from mental disorder precisely as it would with disqualification proceeding from physical disability. The House would reject an absolute physical imbecile, but if a constituency chose to elect a Representative who was largely incapable to attend to his duties by reason of physical disability, but whose incapacity did not proceed to the point of absolute physical imbecility, he would hardly be rejected by the body.

All of these illustrations tend to show that the questions of extent and degree are so material to a suggested disqualification like lunacy that no state functionary would be authorized on an ex parte suggestion, or even on equity, to say that a man should not be a candidate for Congress unless, perhaps, a case was presented of an absolute, raving, dangerous maniac, whose notice was not his own.

In the case in hand Mathew was a man of good education, the subject of recurrent insanity, at times in the asylum, and at other times furloughed on account of his improved condition. The secretary of the Commonwealth declined to enter upon the inquiry into his actual condition, or to delay printing the ballots, to pass on a disqualification which related to membership in a body which possessed exclusive rights in this respect. In refusing to take the step asked, the secretary committed no breach of duty.

If he had withdrawn Mathew's name from the ballot, he might have justified himself by treating the case as an emergency situation not contemplated by law and not to be treated by the usual rules. Evidently, however, he preferred to stand on the law, and to leave to others charged with the duty of inquiry, if such persons existed, to make the inquiry and take the consequent action, which the law did not impose upon him. He preferred to not to establish a precedent which later might be invoked to make of his office, so to say, an office

of oyer and terminer, to pass upon the right to go on the ballot of any one of the persons in the class of disqualified persons established by section 23 of the constitution. He was a ministerial authority, not required to pass on the qualifications of candidates or to make inquiries in that connection, but merely charged with the duty of sending out the names of candidates who lodged in his office the formal notices of candidacy that conformed to the requirements of the statute.

But even if the secretary might have legally withdrawn Mathew's name from the ballot, he did not do so. As a physical fact, his name was on the ballot. He was there conformably to a regular notice.

He was not on the ballot as the result of a trick or conspiracy, but in conformity with the Virginia law, which provides that any man desiring to be a candidate for Congress shall send in his notice to the secretary of the Commonwealth. He forwarded such notice, signed by him and by the witnesses required by the statute. That law is found in the analysis I have filed for the aid of the committee. (See analysis, p. 7.) Upon receipt of a proper notice, without further formalities, the secretary is required to include the name of the candidate forwarding same with the names to be printed on the official ballot. This notice is in the record, page 3, and I venture to say that in all respects it conforms to the law as closely as the notices forwarded by either Mr. Parsons or myself. This man was a candidate in that district for weeks preceding the election. His postals stating his platform went all over the district. One of them will be found as an exhibit, filed with the testimony of Hunt Hargrave, mayor of Chatham. (See Record, p. 415.)

The secretary in good faith, on receipt of the notice, put his name on the ballot. Physically his name is there, and no hair-splitting distinction, such as has been advanced here, can satisfy this committee that a name which is visually on a ballot is not there. It is palpably there, and the voter was required to take notice of it when he came to mark his ticket. This is not a question of a contract between a lunatic and a third party, seeking to bind the lunatic and freely admit that such a civil contract between an adjudged lunatic and another party would be void. The secretary of the commonwealth was concerned with only one inquiry: Is the signature to this notice the signature of Elliott Mathew? Is there such a man as Elliott Mathew and is this his genuine signature? That was all. It can not be said that the signature to the original notice actually fixed by Mathew is a nullity. The contracts of Elliott Mathew may be void, but his actual signature is not a nullity. It is a physical entity. And upon the notice given by Mathew, his name was put on the printed ballots in strict conformity with law.

As I have stated heretofore, the information of this man's candidacy was given out by the Democratic newspapers. For instance, two weeks before the election the news was given out that his name would be on the ballot. (Record, p. 380.)

What follows when a man's name is on the ballot, pursuant to notice? A voter, finding more than one name under a given head, is required by the statute to mark out the names of the candidates for whom he does not wish to vote. There is no hardship in that. The marking may be done by pen or pencil. I think the gentlemen who counted the ballots will agree with me when I say there is no simpler form of ballot in the country than the one used in Virginia.

Nor do the laws of any State make it easier for a voter to indicate his choice than the laws of Virginia. The voter found three names on his ballot under the head "For Congress." The law said to him if you wish to vote for any one of the three, mark out the other two. The chairman put this question to me to-day. Suppose there had been only one name printed on the ticket and a voter had written under that name the name of the lunatic, what would be the effect on the ballot? The effect of that action, by the force of the Virginia law, would be to avoid that ballot.

Mr. KORBLY. Without striking the other one off?

Mr. SAUNDERS. That is what I said. If a voter writes one name in and fails to mark the other off his ballot is void by virtue of the terms of the statute.

Can this committee, a body of lawyers, draw any distinction between a ballot in which the man had written in a name with pen and ink or pencil and another ballot on which a voter of his own volition allowed the printed signature of a candidate to remain thereon? Even in criminal law a man is reasonably presumed to intend that which he does. If I adopt any signature as mine, it is mine. If a voter allowed the printed name of Elliott Mathew to remain on his ballot, it was an act of volition, with consequences just as definite under the laws of Virginia as if he had scratched out two names, leaving the third, and then added the name of Elliott Mathew.

I want to say a word in this connection with reference to the proper rule to be applied to the badly marked ballots. I do not believe that the committee will have any difficulty with respect to the bulk of the ballots that were reserved for future consideration by the full committee. I think that it is altogether likely that when the committee comes to consider these ballots it will count most of them as the judges of election counted them. This in itself will be a vindication of the action of the judges from the charges of irregularity that have been preferred in respect to the count. I venture to say that you have never investigated an election case so free from any suspicion of fraud and wrongdoing as this.

It is desired, however, to call attention to a few of these ballots. It is perfectly true that you wish to get at the intention of the voter; but you must arrive at it in the same way that you get at the intention of a testator or of a grantor in a deed.

The voter's intention must be ascertained in conformity with the rules of law. When the statutes of a State provide that he must express his intention in a prescribed way, then that is the only way in which his intention can be conveyed. If he departs from the prescribed way, his ballot is void. This, in effect, is the rule of the House of Representatives. It has been frequently affirmed. I understood from the honorable chairman of this committee that in his own State, where the Australian ballot system is in force, if I did not misapprehend him, they also try to get at the intention of the voter; but that there was no specific provision of the statute to the effect that if a ballot was not marked in a particular manner it would be void.

Is that correct, Mr. Chairman?

The CHAIRMAN. Our Australian ballot that we have at this time is not the same as it was when I raised that question. The supreme court of our State in passing upon that question said that where the

requirement was that you had to have the cross within the square, it was sufficient if it was substantially in the square; that means the greater part of it should be in the square.

Mr. SAUNDERS. I imagine that under our law that would be true; but there are cases of this kind: Suppose a voter is required to put the mark on the left instead of the right hand side of the ticket. What would be the effect if he put the mark on the right? Would not the ballot be void?

Mr. BENNET. That makes it void in our State.

Mr. KORBLY. And in Indiana.

Mr. SAUNDERS. It makes it void in my State.

What I wished to say in connection with the reserved ballots is this: If the mark is through three-fourths of the name, whether it barely touches the top or the bottom or goes diagonally through the name, that ballot is sufficiently marked quoad that name. Of course, I do not undertake to say that the mark must be through the middle of the name. If it merely touches the top or the bottom, in my judgment it is a sufficient marking. But if the line starts, goes halfway across, and then turns up, as for instance—

~~E. W. Sa~~unders—

that is an insufficient marking. In such a case you need not consider the question of the voter's intention. He has not indicated it, as required by law. If a voter marks half of two names, as for instance—

~~J. M.~~ Parsons,
~~Elliott~~ Mathew,

the committee can not count that ballot for the third unmarked name. The law has not been followed.

And so when the voter makes up and down marks, that marking is insufficient. I do not mean a zigzag mark through the name, for that marking would be sufficient, but as follows: E. W. Saunders, J. M. Parsons. Ballots of the latter character must be rejected.

Again, I submit that the ballots on which the voter has undertaken to put cross marks by the names, in addition to marking through three-quarters of the names, should be rejected. At least, the committee should consider seriously before counting them. Our statute provides that no ballot, save an official ballot, specially prepared as above provided for, shall be counted. (See analysis, p. 11.) When a voter undertakes to add cross marks to his ballot or any additional marks, then the ballot in the form in which he leaves it is not prepared as provided for by our statute.

Now, permit me to read the Virginia statute in this connection.

Mr. BENNET. There is one kind of ballots we certify up as doubtful, and that is where the man makes his mark through the names and then a little wiggle on the side, disconnected from his pencil mark.

Mr. SAUNDERS. The ballots which I have in mind are ballots which have a cross mark like this + beside the name or on some other portion of the ballot. These ballots do not conform to our law, for the reason that they are not specially prepared as provided for. If a voter runs his mark clear through a name, or names, and extends it to the right, that marking is not objectionable, but when he undertakes to add cross marks, then I say that those marks may be properly considered as distinguishing marks.

Now, here is what our statute says in this connection:

No name shall be considered scratched unless the pen or pencil mark extends through three-fourths of the length of said name; and no ballot save an official ballot specially prepared as above provided for shall be counted for any person.

The ballot must be an official ballot; it must be specially prepared as above provided, and then it shall be counted. Of course, the necessary implication is that if it is not specially prepared as provided for it shall not be counted.

Further:

Provided, it shall be lawful for any voter to erase any or all names printed upon said official ballot and substitute therein in writing the name, or names, of any person, or persons, for any office for which he may desire to vote.

I call attention to this paragraph of the law:

Every elector qualified to vote at a precinct shall, when he so demands, be furnished with an official ballot by one of the judges of election selected for that duty by a majority of the judges present. The said elector shall then take said official ballot, and retire to said voting booth. He shall then draw a line, with a pen or pencil, through the names of the candidates he does not wish to vote for, leaving the title of the office, and the name or names of the candidates he does wish to vote for, unscratched.

If a man scratches out the title of the office, that will void the ballot. This has been the law in Virginia for quite a while. You will see in the case of Yost *v.* Tucker that over 1,000 ballots were rejected because the words "For Congress" were erased by the voters. I do not believe, however, that this committee has ever examined a case in which there were fewer void ballots, and fewer questions of difficulty in connection with the return, and the count of the votes, than in this case which you have been investigating for the last two weeks.

I do not believe that in your final count you will practically reject any ballots either for contestant or contestee that were counted by the judges of election. There is no trouble over ballots on which two names are left by the voter. Under any system, Australian or otherwise, those ballots are plainly improper to be counted. Ballots that are not marked as prescribed by law are expressly voided by the Virginia statute.

In the case of Yost *v.* Tucker, which was decided a few years ago, when Mr. McCall, of Massachusetts, was a member of the committee, and took an active part in the case, over a thousand ballots were rejected on the ground that the words "For Congress" had been erased by the voters. This action was in strict conformity with the Virginia law, and is merely one of the many instances in which the House has ruled that when the election laws of a State prescribe that a thing must be done in a certain way, that way must be followed or the ballot will be rejected. There was no question, if the intention could be considered apart from what was actually done to indicate it, that the voters who erased Tucker's name and the words "For Congress," leaving Yost's name, intended to vote for Yost. Yet their ballots were rejected, because the statute provided that the erasure of these words would make the ballot void.

In this connection the following precedents of the House are submitted:

MARKING OF BALLOTS.

The state law providing that ballots shall not be counted unless marked a particular way, ballots otherwise marked should be rejected by the House. (Hinds, vol. 2, sec. 7056.)

A mandatory statute providing that the writing of the name of one candidate under the name, not scratched, of another should make the whole ballot void. Sustained by the House. (Hinds, vol. 2, sec. 1009.)

Although the intent of the voter be entirely plain, the House will follow a mandatory state law, which requires the rejection of the ballot. (Hinds, vol. 2, sec. 1078.)

Although the voter's intent is plain, the House will follow a state law which requires rejection of a ballot. (Hinds, vol. 2, p. 607.)

Where state law requires rejection of ballot, unless the voter scratches two-thirds of the name, a ballot scratched less than two-thirds must be rejected. (Hinds, vol. 2, sec. 1078.)

See case of Yost *v.* Tucker, that in order for a ballot to be counted it must express the will of the voter, but that will must be expressed according to law. (Hinds, vol. 2, p. 608.)

The testimony of the voter can not be received to impeach the ballot recorded as cast by him. (Hinds, vol. 1, sec. 831.)

The latter citation is merely the application to the ballot of the familiar rule relating to the interpretation of written instruments.

Mr. TOU VELLE. What do they consider two-thirds—the name or the initials, or just the name?

Mr. SAUNDERS. That is another thing I wish to bring up. The committee, I think, ought to consider that question. I do not think the spaces between the initials and the last name ought to be considered, for this reason: The printer might make such spaces between the initials and the last name as to make the initials as long as the last name, as, for instance, J . M . Parsons. It would not be reasonable that with a name so spaced a mark through the J and the M and the spaces up to P should count as a mark through one-half of the entire name.

The letters of the entire name should be considered without reference to the space between the initials and as if written together, as, for instance, CMParsons. If three-fourths of the entire letters are marked then that ballot is properly marked. I do not know that the application of this rule will change the result of the count to any appreciable degree, but I submit that that is the proper rule to be followed in ascertaining whether a ballot is properly marked.

A voter may not contradict the plain expression of his ballot. (Hinds, vol. 2, p. 197.)

When a ballot clearly designates the office to be filled and the name of the person voted for no court has ever permitted the voter to contradict his ballot by evidence that he intended to vote for a different person. (Hinds, vol. 2, p. 194.

When it is undertaken to show by circumstantial evidence how a man voted, it should be such as to preclude any reasonable doubt as to how the vote was cast.

It is submitted that if a voter can throw away his vote by voting for one who is admittedly disqualified, it is perfectly clear that, as a free agent, he can throw away his vote by leaving the names of a qualified and a disqualified person on his ballot, provided that when, under such circumstances, the state law makes the ballot void.

The state law providing that ballots shall not be counted unless marked in a certain way, ballots otherwise marked shall be rejected by the House.

The state law requiring ballots to be rejected when not marked with initials of election officers, the House overruled the election officers who had counted such ballots.

The committee find it to be law that ballots on which the voter undertook to express his choice by marks, other than the cross placed in the circle or square, as provided by the statute, are not legal ballots and shall not be counted. (Hinds, vol. 2, sec. 1056.)

These citations make it abundantly clear that under the laws of Virginia a voter did not indicate a choice for Parsons when he scratched out my name and left the names of both Mathews and

Parsons. He has not indicated any intention at all, and his ballot is made void by the express declaration of our statute. It is a mere guess that a voter who left Parsons and Mathews on the ballot intended to vote for Parsons. The committee is not sitting to decide this case or to count votes by guessing. Having counted the ballots in this case and noted the way in which they were scratched, I take it that the committee will agree that it would be a perfectly hopeless enterprise to undertake to determine the politics of the voters in many instances from the ballots which were cast.

Some voters voted for Bryan and Parsons, some for Taft and Saunders, others merely marked out Saunders, or Parsons, leaving the remainder of the ballot untouched. Still others left Taft and Bryan on the ballot, marked out the other presidential candidates, and erased either Parsons or Saunders. How could you determine from such ballots the political affiliations of the voter? One ballot had every name erased but Saunders, Parsons, and Mathew. Another voter left Taft, Hisgen, Parsons, and Mathew. Still another voter left the presidential portion of the ticket unmarked, and scratched out Saunders. It would be wild guessing indeed to determine from an inspection of these ballots, the real purpose of the voter. But our statute forbids guessing. It provides that a ballot containing the names of more than one candidate for the same office shall be void.

I may add in this connection that if a voter strikes out one name on a ballot, it may be fairly taken as an indication that the voter does not intend to vote for that man, but it does not indicate that he has a choice between the names that he leaves, much less that that choice has been indicated.

To arrive at what a voter really had in mind from an inspection of the ballots is an impossibility. On some of the ballots there are no erasures for Congressman. Of course those ballots are void. On other ballots all the names are erased. They are equally void. But why did the voter take the trouble to scratch out all the names, unless it was intended as an emphatic indication on his part that he wanted none of them. Hence, when the committee takes up the Parsons-Mathew, and the Saunders-Mathew ballots they can at best merely figure out this sort of mental process on the part of the voter, that in the one case he decidedly did not want Saunders and in the other did not want Parsons, but as between the names that were left he was entirely indifferent.

The voter must be bound by what he actually did. He must be presumed to intend the natural consequences of his act. The law tells him that if he writes two names on his ballot for the same office, or if he finds three printed names there, and leaves two, his ballot will be void. Hence if a voter leaves two names on a ballot there is nothing for the committee to do but to declare its invalidity.

Mr. THURSTON. There is one thing I want to ask you about, Judge.

Mr. SAUNDERS. Certainly.

Mr. THURSTON. That a ballot otherwise properly marked by the voter, is there any express provision by your law, if you find any, that you reject it because he places upon it a distinguishing mark?

Mr. SAUNDERS. No.

Mr. THURSTON. I have not found any——

Mr. SAUNDERS. As I told the committee, that is a strong deduction I draw from the general tendency of the rulings under the Australian

ballot system, and from that section of our law which says that a ballot of the form prescribed, and prepared as provided for, shall be counted. In conformity with the decisions relating to the Australian ballot, it is to be implied from this language that if a voter adds marks to his ballot, which may properly be styled distinguishing marks, he violates the primal purpose of this system, and his ballot should be declared void.

Mr. BENNET. What, in your judgment, do the words "distinguishing marks" mean?

Mr. SAUNDERS. I don't think we have those words——relating to the ballot prepared by the voter.

The CHAIRMAN. Oh, yes you have.

Mr. BENNET. It says "a distinguishing mark or symbol." That is the language.

Mr. SAUNDERS. Well, that language relates to the form of ballot required to be provided by section 28 of the constitution. Pursuant to that section the ballots in Virginia may not be decorated with the eagles, tomahawks, and Indians, and all the other fancy headings which appeared on the ballot from New York that was exhibited here a few days ago.

Mr. BENNET. Is it your judgment that that language refers to the preparation of the ballot by the county officers?

Mr. SAUNDERS. Yes.

The CHAIRMAN. I do not think there is any question of that.

Mr. SAUNDERS. Now, Mr. Chairman, I do not think I speak amiss when I say that to-day the elections in my State are as honest as the elections of any State in the United States. Our election laws and system of voting are as simple as you find anywhere. A day or two ago Mr. Carrico referred to a statute which forbids a sample ballot to be used among the voters on election day.

Such a statute was in force some years ago and is still on the books, but it is now a dead letter. Mr. Parsons's supporters were evidently not afraid to violate this statute, for at Ridgway, a precinct in Henry County, where contestant received a large majority, a sample ballot was in use among the Republicans during the entire day of the election. This is not denied, and the sample will be found among the exhibits in connection with the testimony of J. W. Griggs. (See page 239 of the record.) The fact of its use was well known.

Mr. BENNET. What do you mean by form ballot?

The CHAIRMAN. It is a sample ballot.

Mr. SAUNDERS. Here is the sample itself in this volume of the exhibits. The party using this ballot was an active supporter of Mr. Parsons.

Mr. CARRICO. Was it a sample ballot, or just showing the position in which the three names appeared on the ticket?

Mr. SAUNDERS. It was a sample ballot. It contained the name of every candidate provided to be voted for at that election.

Mr. CARRICO. Having the presidents and vice-presidents on it?

Mr. SAUNDERS. Yes, all of them. I do not find this exhibit as readily as I expected. But it is here. I examined it this morning.

The CHAIRMAN. We will find it.

Mr. SAUNDERS. It contains the names of all of the candidates for president and vice-president and the names of the three candidates for Congress. It was in use all day by an active supporter of Mr.

Parsons, and no prosecution has grown out of it. The statute is a dead letter. Under our present constitution every voter who registered prior to 1904 is entitled to the aid of a judge of election in marking his ballot, whether he physically requires it or not. He has that absolute right under the constitution. With respect to the voters who have registered since that date, as they are all able to read and write they are required to mark their own ballots. This is not a hardship, as it is not a difficult task to mark a Virginia ballot correctly.

The CHAIRMAN. They are not required to be able to read and write?

Mr. SAUNDERS. Well, the applicant is required to make his application in his own handwriting. There is no exact provision requiring a man to be able to read and write in order to be registered, but he is required to make his application in writing without assistance and to include a lot of prescribed things in his application. In order to do this, a man must be able to read and write. It is a necessary implication. Here is the section.

SEC. 73. Who to be registered:

Each registrar shall, after January 1, 1904, register every male citizen of the United States, of his election district, who shall apply to be registered at the time and in the manner prescribed by law, who shall be 21 years of age at the next election; who has been a resident of the State for two years, of the county, city, or town, one year, and of the precinct in which he offers to register thirty days next preceding the election; who has at least six months prior to the election paid to the proper officer all state poll taxes assessed or assessable against him, under this or the former constitution, for three years next preceding that in which he offers to register; has paid $1.50 for satisfaction of the first year's poll tax assessable against him; and unless physically unable to do so, shall make application to the registrar in his own handwriting without any aid, suggestion, or memorandum in the presence of the registrar, stating his age, name, date, and place of birth, residence, and occupation at the time and for two years next preceding, and whether he has previously; and if so, the State, county, and precinct in which he voted last, and so forth.

Now, a man who can make such a statement as that would surely be able to go into a booth and mark out Parsons and Mathew, if he desired to vote for Saunders, or if he wanted to vote for Parsons to mark out Saunders and Mathew; or if he wanted to vote for Mathew, to mark out Parsons and Saunders. So much for the law in this connection.

I submit, therefore, Mr. Chairman, that having in mind the Virginia law, and the uniform decisions of the House, there is but one disposition that can be made of the Parsons-Mathew, and the Saunders-Mathew ballots, and that is to hold them void, as the judges of election did.

Whatever may have been the intention of these voters, our mandatory state law renders them void, and in this respect the House will follow the law of Virginia. The ballot itself was in nowise calculated to deceive or mislead the voters.

It has been stated that the voters did not know Mathew. Possibly a large number of them did not know him, but at least they knew him as well as they knew the candidates for President other than Bryan and Taft. There were three of these tickets, I believe, in addition to Bryan and Kern and Taft and Sherman. A voter who wished to vote for Taft or Bryan, as the case might be, was required to mark out the other names. Surely such a voter when he came to the three names for Congressman had learned by that time that if he wanted to vote for one of them he must mark out the other two.

I desire now to take up another legal phase of this case. I stated to the committee heretofore that the law of Virginia does not require a man to be on the tax list in order to vote. I said that I would undertake to satisfy the committee on that proposition by an application to the constitution of the ordinary principles of construction, supported by the express decisions of some of our courts.

This is the provision of the constitution which affords a citizen the right to vote:

SEC. 21. Conditions under which parties duly registered shall have the right to vote:

Any person registered under either of the last two sections shall have the right to vote for member of the general assembly and all officers elective by the people, subject to the following conditions: That he, unless exempted by section 22, shall, as a prerequisite to the right to vote, after the first day of January, 1904, personally pay, at least six months prior to the election, all state poll taxes assessed or assessable against him under this constitution during the three years next preceding that in which he offers to vote: *Provided*, That if he register after the first day of January, 1904, he shall, unless physically unable, prepare and deposit his ballot without aid on such printed form as the law may prescribe; but any voter registered prior to that date may be aided in the preparation of his ballot by such officer of the election as he may designate.

Looking to the title of the section, it will be noted that it is entitled: Conditions under which parties shall have the right to vote. Looking to the body of the section, it will be perceived that the right is afforded upon the payment of certain taxes. The citizen is required to "personally pay, at least six months prior to the election, all state poll taxes assessed or assessable against him." When he shall have done that, he is thereby clothed with the right to vote. The right to vote is given to the individual by the organic law of our State just so soon as he shall have complied with the requirements relating to the payment of his poll taxes. These are the taxes assessed or assessable against him during the three years next preceding that in which he offers to vote. This section says that having paid these taxes, he is thereby ipso facto invested with the right to vote for members of the general assembly. There is no requirement that he shall do anything else. No further action on his part is necessary in order that he may be invested with this great right of suffrage which has been the subject of struggle on the part of our race for hundreds of years. The moment the taxes are paid as prescribed the right to vote thereby attaches.

Mr. THURSTON. Has the legislature the right to prescribe the proof that shall be made?

Mr. SAUNDERS. No, sir; not so as to make it a prerequisite to the right to vote.

Mr. THURSTON. That is where we differ.

Mr. SAUNDERS. Of course, I understand that that is where we differ. I say that the legislature has no such right. The constitution confers the absolute right of suffrage upon compliance with the prescribed conditions. I am astonished that these gentlemen who are always complaining about limitations on the right of suffrage in the South should now contend for a construction of the constitution which would limit suffrage in Virginia and make it more difficult to vote; a construction that would hamper and restrict the voters in the exercise of their right. Why should such a construction be placed on our organic law, when it is not a necessary construction, when it is a strained and violent one?

Mr. THURSTON. We have numerous constitutions which prescribe the qualifications of an elector and stop there and say nothing about restrictions; and yet the state legislatures have always been conceded to have the right to require registration at the time and manner and way in which they might see fit to prescribe it as the method of establishing the facts.

Mr. SAUNDERS. All those things would depend upon the provisions of the organic law of those states. I stand upon the provision of our constitution which says that when you shall have done certain things you have the right to vote. We have provided in the constitution for registration. That, too, is a prerequisite. But when you are registered and have paid your taxes you are entitled to vote. Now you want to take that right away. You want to make it dependent on something else.

Mr. THURSTON. What I refer to are constitutions that have not a word about registration; that provide the qualifications of a man's right to vote; that give him the absolute right; but legislatures fix and establish the proof by which he shall prove the right to vote.

Mr. SAUNDERS. No; it is registration to which you refer; it is nothing else——

Mr. THURSTON. No; that is only an illustration.

Mr. SAUNDERS. Yes, but that is a very different thing from saying that when a man has done the thing required by the constitution, which is the payment of the tax, he shall not be entitled to exercise his right until he has done something else of an entirely different character.

Mr. THURSTON. No; if the constitution gives him an absolute right, he being 21 years of age and a citizen of the United States, to vote, if your contention is true the legislature has no right to go on further and prescribe that he shall register.

Mr. SAUNDERS. Your contention may be sound with reference to the constitutions of the States to which you refer. I have not seen those decisions, and they have not been cited, but our constitution has provided for registration, and has further provided that when a citizen has registered and paid his taxes he shall be entitled to vote. I do not, of course, undertake to say that the constitution could not require a voter to be on the tax list. Such a requirement could be made in the same or a subsequent section, but I maintain that it has not been done by the constitution, and if it has not been done by the constitution it has not been done by the legislature, for the statute is merely a copy of the constitution. This is a question of constitutional interpretation. The provision relating to the tax list is found in the constitution itself.

Mr. CARRICO. Does not section 38 of the constitution, after section 21, provide that the man may vote after paying his poll tax, and does section 38 provide the manner of his proving it?

Mr. SAUNDERS. Certainly. I am coming to that fact which constitutes the strongest feature of my contention that presence on the tax list is not a prerequisite to voting. This committee will never hold, as a matter of legal construction, that a right which is given by one part of the organic law which is clear will be taken away by virtue of the ambiguous declarations of a later section.

The later section to which you refer does not say in specific terms that if you are not on the list you can not vote. While this section says that when you have paid your taxes, as required, you can vote.

Section 38 provides for a list, and it provides that that list shall be conclusive evidence of what it contains for the purposes of voting. But nowhere does it hint that a man who has discharged the requirements of the section shall lose the benefit of that discharge should the treasurer negligently fail to put him on the list. It would be an extraordinary thing that the negligence of a functionary to do a ministerial act should cause a voter to lose a right which the constitution had already given to him. Such a view of the constitution would be destructive of an essential principle interpretation of written law, whether statutory or organic, that when one section of an act is clear, a right given thereunder shall not be construed to be taken away by a later section which is ambiguous.

There can be no question as to the meaning of section 21. There is not a lawyer in Virginia or elsewhere who would be willing to get up before a court and undertake to say that there is any doubt as to the meaning of this section. But it can not be said that section 38 is equally clear in respect to the effect to be given to the list. On the contrary, it is a subject of question by every one who examines its provisions.

It has been decided by some of our courts that this section shall not be construed to require the presence of a man's name on the tax list as a prerequisite to voting.

This is section 38 in extenso:

SEC. 38. After the 1st day of January, 1904, the treasurer of each county and city shall, at least five months before the regular election, file with the clerk of the circuit court of his county, or the corporation court of his city, a list of all persons in his county or city who have paid not later than six months prior to election the state poll taxes, required by this constitution, etc.

And then it says:

The clerk shall deliver, or cause to be delivered, with the poll books, a reasonable time before the election, to one of the judges of election of each precinct of his county or city, a like certified copy of the list, which shall be conclusive evidence of the facts therein stated for the purpose of voting.

Mark the language, Mr. Chairman. Not that the presence on the list shall be conclusively required for the purpose of voting, but that the list "shall be conclusive evidence of the facts there stated for the purpose of voting."

Now, that is a very different proposition from undertaking to say that presence on the list shall be conclusively required for the purpose of voting. The effect of the list, when reasonably considered with respect to its significance, is that it is conclusive evidence that a man has paid his taxes for the years for which he is on the list.

If a man is on the tax list he need not concern himself further to prove that he has paid his taxes, and is within the benefit of the preceding section which gives him the right to vote upon that payment. In other words, the list is an evidence of the payment of taxes. Are you going to take that which was intended to be in aid of a man's right to vote and make of it a barrier in the way of the exercise of that right? That is the effect of the construction for which these gentlemen contend. In substance they maintain that what has been given by an explicit section shall be taken from the voter by a doubtful and ambiguous section; that the evidence of payment shall be made as essential a prerequisite as the payment itself. That is to put the shadow on an equality with the substance. That is to interpret a section of

doubtful import so as to make it amend a section which is clear and explicit.

Now, that is my view of the constitutional provision providing for the right to vote on payment of taxes. You may ask me in this connection as to the necessity for the list. The advantage of being on the list is obvious. If a man is once on the list he is provided with an easy method of proving that he has paid his taxes. He need not take his tax tickets to the polling place. He need not concern himself to take the treasurer or the deputy treasurer as a witness to prove that he has paid his taxes and is entitled to vote. He goes to the polls, and the judges ask him, "Have you paid your taxes?" He need only reply, "Look on the list." If his name is there, he has nothing to be worried over on the score of taxes. Therefore, the convenience to a voter by reason of being on the list is a sufficient inducing motive to cause him, when it is reasonably possible, to get on the list.

But take the case of a voter who is out of the county when the list is posted, and there are scores of traveling men who are away from home at that period of the year for weeks at a time. When the lists are posted they are not in a position to inspect them, and even if they are informed by others that they are not on the list, they are not able to return. Will you place that interpretation on the constitution, which will deny them the right to vote because they are not able to leave their business and return to correct a situation due to the negligence of the treasurer? In many cases it would be a hardship on them to return and set in motion the necessary procedure to get on the list. Why should they be compelled to do this, when all the while they have the evidence in their possession in the way of receipted tax tickets that they have discharged the fundamental requirement of the organic law?

Again, there are many men throughout the rural communities who do not see these lists, men who are busy with their work, and who are absorbed in other matters. In many cases the voters would be compelled to walk 2, 3, or 4 miles to look at the list which is hung up on the front door of the voting place. Must a man who has paid his taxes stop his work to do this? The farmers are busy planting or harvesting their crops, and in the stress of their work they forget that the list has been posted or that the time to inspect the same is rapidly passing. Are you going to say that these voters shall not vote when they have lived up to the requirements of the organic law by the payment of the taxes required? Do you desire to make the constitution of Virginia a stumbling block in the way of honest people who wish to vote and are able to show in the most satisfactory manner, in many cases by the direct evidence of the treasurer or his deputies, that they have paid their taxes? Why should anyone seek to impress upon the constitution an interpretation which carries such a result of inconvenience and hardship? There are many voters who are not required to be on the lists and others who can not get on the lists even if they desired to do so. Old soldiers do not pay capitation taxes and are not required to be on the lists. A voter who moves in from another county, if he has paid his taxes in the other county, is allowed to vote without being on the list. He can not get on the list. A voter coming of age after May of the year in which he offers to vote can not get on the list.

He must establish his right to vote in some other way, by a receipted tax ticket, for instance. Why should such a ticket be effective in the one instance to show payment of taxes and not in another, when in both cases the question is merely whether an obligation has been discharged?

Now, Mr. Chairman, this matter has been before the courts of my State——

Mr. BENNET. Does the constitution of your State prevent a man coming in from other counties, and men who have become of age, to prove that they have paid taxes? I am not asking you about an exclusive method, but a method.

Mr. SAUNDERS. There is nothing in the constitution providing for a voter who comes from another county. In that connection, however, I will say that the inquiry develops a feature of the general situation upon which I rely to support my contention that presence on the tax list is not a prerequisite. This class of voters can not get on the list in the second county and may not have been on the list in the first county. Hence they must prove otherwise that they have paid their taxes. The legislature has provided a way, but it is not made the exclusive way. We are not concerned with the manner of proving that the prerequisite has been complied with, but with the fact that it has been adequately established; hence my contention that on proof that a man's taxes have been paid he is entitled to vote. If the list is made primary evidence and a man is not on the list, he ought not to be denied the right to produce what may be called secondary evidence of payment. I asked a day or two ago what was the rule in the county of Grayson as to holding that a man must be on the list, and I understood the reply to be that in that county the judges required voters to be on the tax list.

Mr. CARRICO. No.

Mr. SAUNDERS. I misunderstood you.

Mr. CARRICO. I said as a general rule.

Mr. SAUNDERS. As a matter of fact the judges up there didn't hold anything of the sort as a matter of uniform rule. At one precinct there were a large number of Republican voters who were allowed to swear themselves in on proof of the payment of their taxes. These voters were not on the list at all. (See Analysis, p. 31, Record, pp. 296–298.)

Mr. CARRICO. And I think they were illegal voters.

Mr. SAUNDERS. Oh, well, you may as a matter of logic and consistency take that view now. I hold that they were legal voters. It simply goes to show that there was no uniform application of the principle that a voter must be on the tax list as a prerequisite to vote. The ruling was different at different precincts.

Mr. NELSON. What is the rule of construction in your State as to helping men to vote or barring them from voting; is it to encourage voting or not?

Mr. SAUNDERS. It is to encourage voting, certainly. To-day in Virginia, as I have said, we have the simplest system in the world. Every voter registered prior to 1904 has the right to be aided in the preparation of his ballot; and a man who has registered since that time can read and write, so that he does not need any help.

I am contending for a view of the constitution, and my contention, which is in strict conformity with the usual principles of interpreta-

tion of written instruments, will enable a man to vote who has actually paid his taxes, and can prove the fact. My opponent stands for a construction which will interpose obstacles in the way of a voter. This contention of contestant is an astonishing proposition, and I have no doubt that it will make this impression on the committee.

The very point in question was drawn in issue in the corporation court of the city of Staunton. A local-option election was held there, and a contest arose over the result. Judge Holt, the judge of the court, decided that it was not necessary for a voter to be on the tax list in order to vote. The paper which I now present contains his ruling. It is not a formal opinion, but is in the form of a letter in response to an inquiry from me.. I will read the letter, which is as follows:

Replying to your letter of the 24th, which has just reached me, I am sorry to report that I am unable to comply with your request for a copy of my written opinion in the local-option case. While I prepared one when the original petition came on to be heard on demurrer, yet when the cause was presented on its merits at the trial I was forced to pass upon questions as presented. The issue as to the meaning of that part of section 38 of the constitution, which declares that "the treasurer's list shall be conclusive of the facts therein stated," was not raised until then. The substance of my judgment was that this constitutional provision meant what it said and nothing more; that it could not be construed as presenting the sole criterion in determining the right of an elector to vote. It must be admitted that it can not govern the case of the "old soldier," and it seemed to me that if we admit that any exception can exist at all then we are driven to the conclusion that it is not "conclusive evidence of the facts therein stated," save in the limited degree indicated.

The chairman of the committee asked me a question the other day which tended to show the hardship that would follow from the interpretation sought to be placed on the constitution by contestant. The question propounded was this: "Suppose a man has actually gone to the court and has actually, in conformity with this section, proved his payments and the court has made an order for him to go on the list and the clerk failed to put him on the list. Could that man vote?" According to these gentlemen's contention this voter could not vote. Looking to the list, the judges would find that his name was not there. Hence he would be excluded, although he had performed the requirements of the law in respect to securing an order from court placing him on the list. That is one of the illustrations of hardship. There are many others that might be given, and they all support the conclusion that the constitution never designed to put such a stumbling block in the way of voting as this alleged requirement to be on the tax list.

Judge Holt continues:

Not only may old soliders vote, whose names are not on this list registered as such, but an old soldier who did not register and claim his privilege at the time of registering may still upon proof vote without prepayment of poll taxes. Again, it is clear that the constitution makes provision for those who became of age during the current year and permits them, upon registration and payment of one year's poll tax, to vote. Such names should not appear upon the treasurer's list at all, for that list the constitution in terms says shall contain the names of those "who have paid not later than six months prior to such election the state poll taxes required by the constitution during the three years preceding that in which such election is held."

In this connection I want to call the attention of the committee to a state of facts existing in Carroll County, which absolutely stamps a large number of voters in that county as illegal voters, if contestant's contention is sound. There were a large number of voters in that county who were on the delinquent list. There is no provision for placing these people on the list that we have been discussing. Hence,

if appearance on the tax list is prerequisite for voting, all of these voters must be treated as illegal voters. If they were placed on the tax list, either by the treasurer or the county clerk, that action on their part was illegal. Hence if these voters were placed on the list they were illegally there, and if not on the list, they could not vote. There is no legislation on the subject at all. A voter may be on the delinquent list for two of the three years for which he may be liable to pay taxes. The law provides that the delinquent taxpayer shall pay those taxes to the clerk. There is no provision that the clerk shall put them on the list. There is no provision that these taxes may be paid to the treasurer, although in some instances this appears to have been done, nor is any authority given to the treasurer to place these parties on the list under any circumstances. There is absolutely no law to that effect.

Mr. BENNET. After a certain length of time a man who fails to pay his capitation tax is returned delinquent?

Mr. SAUNDERS. Yes.

Mr. BENNET. And after that he must pay it to the clerk instead of the treasurer.

Mr. SAUNDERS. Yes; the clerk gives him a receipt. But there is no way provided for him to get on the list on such payment.

Mr. BENNET. Your contention is—unless your argument is correct, your contention is—that there is no way a man once on the delinquent list can get on the tax-paid list?

Mr. SAUNDERS. He can not get on the list for the years for which he is delinquent.

Mr. BENNET. He has to pay the treasurer for three successive years?

Mr. SAUNDERS. Yes. A voter can get on the list only for the years for which he pays his taxes to the treasurer. I state this in the presence of the gentlemen who represent contestant, and would like them to correct me if the statement is not true.

Mr. CARRICO. Did not the clerk of Carroll County furnish the treasurer with a list of the parties who had paid their delinquent taxes to him?

Mr. SAUNDERS. Cite me the law that authorized him to do that. The law says the treasurer shall put on the list the men whose taxes have been paid in his office. Surely you do not undertake to say that when the constitution provides that the treasurer shall return a list of the persons who have personally paid through his office, he can certify to a list as "personally paid," when a number of those payments were not made to him but to another official? If the payments were paid to John Smith in the country, do you contend that the treasurer could make oath that they were personally paid to him or to his deputy? No; there is no provision in the law by which these persons can get on the list for the delinquent years.

Mr. THURSTON. They can go to the court.

Mr. SAUNDERS. They can not go to the court. There is no provision allowing voters in this class to go to the court, or for the court to place them on the list.

Mr. BENNET. It says that within thirty days after the list has been returned, and he has been omitted from the certified list under your contention——

Mr. SAUNDERS. What certified list is that?

Mr. BENNET. The treasurer's.

Mr. SAUNDERS. And why is the treasurer given notice in that connection?

Mr. BENNET. If you are going to put a strict construction on it in one case you would have to in the other.

Mr. SAUNDERS. Oh, it is my opponent's contention that a man must be on the list. I simply maintain that there is no authority for the voters in this class to go to court or to be placed on the list by any official. I do not think that it is necessary for them to be on the list. But if you hold, by liberal construction, that a man who has paid his delinquent taxes can apply to the court to be placed on the list, I do not think you will have any difficulty in drawing the conclusion that I draw from section 21 and section 38 of the constitution, that a voter who has paid his taxes is not required to be on the list at all. Section 38 requires the treasurer to be given notice in those cases where he has negligently failed to place voters on the list who have paid their taxes to him. The treasurer is not concerned with the parties who have paid their delinquent taxes to the clerk. He is not required, in the first instance, to put them on his list. I have never heard—and I do not think anyone else has heard—of a voter applying to court to be placed on the list on the ground that he has paid his delinquent taxes to the clerk. Such a case as that, I venture to say, has never arisen in the State of Virginia. I resume, now, the reading of Judge Holt's letter.

When we take up the question as to the right of those who have moved into the city to vote and who have paid their poll taxes as required by the law, but who are not on the treasurer's list, we find that the statute adopts the language of the constitution and says that the treasurer's certificate to the effect that such poll taxes have been paid "shall be conclusive evidence as to the facts therein stated." (86–d of the code.) It must, therefore, be construed as a constitutional provision would be. Failure to present such a certificate is not conclusive evidence that the poll taxes have not been prepaid.

I was further of opinion that even if so narrow a construction should be given to this provision of the code, the court should accept as a substantial compliance with the statute, tax receipts, they being in substance certificates from the treasurer to the effect that the taxes for which they were issued had been paid.

Whether this be true or not did not seem to me to be a matter which I had to determine at the hearing. The judges may have permitted an elector to vote without having made proper inquiry as to qualifications. Their failure to do so, in my judgment, was not sufficient ground for rejecting his ballot. The question for me to determine was not, Did they fail to require the presentation of satisfactory evidence as to his qualifications? but rather, Was he in fact entitled to vote? If he was, then his vote should not be rejected.

The proposition decided by Judge Holt is the very proposition that I have undertaken to present to this committee. I want to digress a moment. Many of the voters who are attacked by contestant were not challenged at the time they voted. It is a part of my contention that all of these votes are strongly presumed to be legal, and that when contestant now assails them, he must exclude by his evidence all the suggestions according to which these votes may have been legal. See Arden *v.* Allen, 34th Congress. If there is a single suggestion left, according to which the vote could be considered to be legal, the committee will conclude that the contestant could not negative this suggestion, and the vote will be allowed to stand.

As showing how far the House will go in support of the presumption that the sitting Member is entitled to his seat, I will call the attention of the committee to the Michalek case, which was decided some years ago in the House.

One of the questions there was whether Michalek had been naturalized, and there was a good deal of evidence to show that such was the fact, but the committee reported as follows in that connection. There are five ways in any one of which Michalek might have become a citizen of the United States. To make a prima facie case against the sitting Member it would be necessary to examine the records in each of six courts, or to make in all eighteen separate examinations of records relative to three persons. In other words, the burden was on the attacking party to exclude the possibility that Michalek might be a citizen by submitting the collective evidence to that effect afforded by eighteen separate examinations. Until this was done, the presumption of citizenship applied in favor of Michalek, and no prima facie case was made out, however favorable the examinations, short of eighteen, might have been to the claim of noncitizenship.

This is certainly a strong case in support of the rule that a contestant alleging irregularity, in order to sustain his contentions, must exclude by his evidence all reasonable possibilities whereby the matter under investigation might be legal. (Hinds, vol. 1, p. 410.)

Mr. KORBLY. That is, the presumption is that that which has been done has been rightfully done.

Mr. SAUNDERS. Yes. It is further presumed that the judges of election would not allow an illegal voter to vote.

This same question of the tax list has been before the circuit court of my county in another contested-election case. A voter was challenged on the ground that he was not entitled to vote because he was not on the tax list. It was conceded that he had paid in ample time all the taxes for which he was liable. The opinion of the court is a full and able one, and discusses the law of the case very elaborately.

Opinion of Judge Campbell:

In this contest the preliminary question is raised whether this complaint of an undue election can be entertained on the facts, the contestees averring that S. Preston, one of the fifteen signers of said complaint, was not a qualified voter at said election for the alleged reason that his name did not appear on the certified and posted copy of the treasurer's list of those who had paid their state poll taxes as required by the constitution and that such appearance of his name was indispensable to his right to vote.

It will be observed that the court states the exact contention that is under consideration by this committee.

If this contention is sound, and S. Preston's name was not on said list, then the complaint must be dismissed, as striking his name from the complaint would leave only fourteen qualified voters signing and the statute (Code 1904, sec., 586a) requires the complaint to be made by fifteen or more qualified voters. Whether said Preston was in fact on said treasurer's list is a matter in dispute, but in the view I take of the object and requirement of the treasurer's list provided for by the constitution, it is immaterial whether said Preston was or was not on it—

The court is here referring to another question that is not before this committee, and has no sort of relevancy in this connection,

provided he had in fact paid his state poll taxes as required. By section 18 of the constitution, "Every male citizen of the United States, 21 years of age, who has been a resident of the State two years, of the county, city, or town one year, and of the precinct in which he offers to vote, thirty days next preceding the election in which he offers to vote, has been registered, and has paid his state poll taxes, as hereinafter required, shall be entitled to vote for members of the general assembly and all officers elective by the people."

Having the qualifications of age and residence, the citizen is given the right to vote, if he shall register and pay his state poll tax as required by the constitution.

Section 19 provides for registration prior to January 1, 1904, and section 20 for registration thereafter, the provisions of both of which sections are immaterial to this inquiry, except that by the former the "old soldier" registration is provided for, and by section 22 he is exempted from payment of poll tax, as a prerequisite to right to register or vote; and by the later (section 20) it is provided that citizens having the requisites of age and residence prescribed by section 18 "Shall be entitled to register, provided, first, that he has personally paid to the proper officer all state taxes assessed or assessable against him under this or the former constitution for the three years next preceding that in which he offers to register; or if he comes of age at such time that no poll tax shall be assessable against him for the year preceding the year in which he offers to register, has paid one dollar and fifty cents in satisfaction of the first year's poll tax assessable against him."

Having thus provided the terms for registration, the constitution, section 21, provides that "Any person registered under either of the last two sections shall have the right to vote for members of the general assembly and all officers elective by the people, subject to the following conditions." These conditions are two: First, that he shall personally pay, at least six months prior to the election, the state poll taxes with which he is assessed or assessable for the three preceding years. Second, that if he registers after January 1, 1904, he must, if physically able, prepare and deposit his ballot, without aid, on the printed form prescribed.

It will thus be seen that so far the constitution (sections 18, 21) gives to every registered voter who has personally paid his poll taxes as prescribed, the absolute and unconditional right to vote.

If his right to vote is then to be made dependent on something further, it must appear elsewhere in the constitution and in terms as plain and unmistakable as the language of section 21, which says "he shall have the right to vote" if he has registered and paid his poll taxes as required. An examination of the other sections of the constitution relative to the elective franchise discloses that it not only does not in direct terms qualify or restrict the rights of the registered voter as fixed by said section 21, but does not even deal with the subject inferentially—unless it can be said to do so by implication and argument under section 38. This section (38) deals with the duties of the treasurers, first, of courts and sheriffs in regard to making out, copying, posting, etc., list of those who have paid their state poll taxes within the time, for the years and in the manner required to entitle the registered voters to vote at the next election.

The voter himself is given no powers nor subjected to any restrictions thereunder, except that if improperly omitted from the list he may, within thirty days from the posting thereof, apply to the court or the judge in vacation to have the list corrected and his name inserted. He is not expressly subjected to the penalty of losing his right to vote if he fails to have the correction made, nor does it seem to me is he subjected to such penalty by any fair implication from the language used. It would be carrying construction far, indeed, to hold that one who had fully qualified himself to vote and was given that right in plain and unmistakable words of the constitution, with no condition or qualification attached, could be deprived of such right by implied meaning given to words equally plain and carrying no such meaning on their face.

The real object and meaning of this section I will discuss further on after considering the remaining paragraphs of section 38, which have been argued to have the effect of depriving the otherwise qualified voter of his right to vote. So much of the second paragraph as relates to the subject provides that "the clerk shall deliver, or cause to be delivered, with the poll books, at a reasonable time before every election, to one of the judges of election of each precinct of his county or city a like certified copy of the list, which shall be conclusive evidence of the facts therein stated for the purposes of voting."

What are the facts therein stated, or required to be stated? This is answered by the first paragraph of said section 38, by which the treasurer of each county and city is required to file with the clerk of the specified courts "a list of all persons in his county or city, who have paid not later than six months prior to such election, the state poll taxes required by this constitution during the three years next preceding that in which such election is held; which list shall be arranged alphabetically, by magisterial districts or wards, shall state the white and colored persons separately, and shall be verified by the oath of the treasurer."

The list, then, is conclusive of the following facts: (1) That the persons named have personally paid their state poll taxes, (2) that they were paid not later than six months prior to the election, and (3) that they were paid for the preceding years therein stated—presumably for the three preceding years for which they respectively were assessed or assessable—but not conclusively, for the list may not so state nor may the treasurer know whether each was so assessable, and so far as these facts qualify the

persons listed to vote they can not be questioned. The words used are plain and would seem incapable of misunderstanding, and I am unable to see how their meaning can be stretched so as to conclusively deprive any qualified voter not in the list from exercising his constitutional right to vote, any more than it can be held to conclusively give every one listed the right to vote. The list can not surely be conclusive by inclusion of all who are on the list and also conclusive by exclusion of all who are not on it.

I would say in that connection that this list does not give the right to vote. A voter may be on this list and absolutely without the right to vote. The list conclusively proves certain things, but it does not prove that you have been registered. A man can be on the list without having been registered. So the list per se, does not afford the right to vote. It is simply evidence of certain things. Quoad the facts stated in the list, it is conclusive evidence.

If no facts are stated as to the latter, how can it be conclusive in any respect as to them, when the very language used is simply that it "shall be conclusive of the facts therein stated"—

The view of this court, it will be seen, absolutely concurs with that of Judge Holt.

(Reading further:)

Nor do I see how the added words, "for the purpose of voting," can alter the meaning, for they simply have relation to "the facts therein stated," as to payment of the state poll taxes.

The third (and final) paragraph of said section 38 provided that "further evidence of the prepayment of the capitation taxes required by this constitution as a prerequisite to the right to register and vote may be prescribed by law." I am unable to see at first glance what bearing this clause has or can have on the right to register, but that is apart from the question under consideration, and as to evidence of the right to vote it is ancillary to the clause just considered and can have no greater effect, and any enactment of the legislature thereunder will be subject to the same reasoning.

The constitution having provided one conclusive means of showing, or enabling the voter to show, his qualification to vote, so far as prepayment of capitation taxes is concerned, authorizes the legislature to prescribe other evidence. It has seen fit to do so, I believe, in but one class of cases. By section 86d of the code it is provided that "In any case where a voter has been transferred from one city or county to another city or county, and has paid his state poll taxes for the three years next preceding that in which he offers to vote, or for any of said years, in any county or city in this State, such voter may exhibit to the judges of election the certificate of the treasurer of the city or county wherein the taxes were paid, showing such payment, and that the same was made at least six months prior to the election by the person offering to vote, such certificate shall be conclusive evidence of the facts therein stated for the purpose of voting."

It was suggested that without further legislation the voters who had paid their taxes to the clerk could apply to the court to be put on the list. If that contention is sound, then the voters who had paid their taxes in another county could make a like application to the court, and there was no occasion for legislation to provide for the issue of a certificate of payment, upon which they would be allowed to vote. Evidently, however, this view did not appeal to the legislature, so they proceeded to provide a convenient means of proving payment when taxes had been paid in another county. While a convenient method, it is not intended to be and should not be held to be an exclusive method. The opinion proceeds:

Here is evidence other than the treasurer's list, and it is made conclusive in the very words of the constitution, yet the name of the voter transferred may not be on the treasurer's list of either county or city.

That is a point that I had not brought out. The man who comes in from the other county may not have been on the list in that county

at all, and yet he comes into this county and does not get on the list in this county. If being on the list somewhere is essential, then there is a fellow who has escaped being on the list at all, and yet is allowed to vote.

Mr. CARRICO. Does not the constitution there fix the mode by which he can prove that he has paid his poll tax?

Mr. SAUNDERS. No; this is a statute of Virginia, providing the convenient method mentioned a moment ago. But as the judge has pointed out——

Mr. CARRICO. The statute—does not that point out how he may prove it?

Mr. SAUNDERS. Yes, certainly; but as the judge is pointing out a man may not have been on the list in either county, and if presence on the list is a constitutional prerequisite the legislature can not flank that requirement; no enactment of theirs can relieve him from the necessity of being on the list somewhere. All of these troubles arise from the effort to give an additional purpose to the list. Treat it merely as conclusive evidence of the facts therein stated and not as exclusive evidence, and the way of the voter to the polls will be rendered easier.

Mr. KORBLY. A man could be on that list wrongfully?

Mr. SAUNDERS. Yes.

Mr. KORBLY. And it would be conclusive evidence, so far as voting is concerned, but not conclusive evidence so far as discharging his debt to the State is concerned.

Mr. SAUNDERS. That is my view; yes. The Commonwealth could recover the taxes if the voter had not, in fact, paid them.

Mr. THURSTON. Is it not a fact that the legislature has prescribed that in a particular case growing out of the necessities of the situation the treasurer's receipt may be submitted to the judges of election?

Mr. SAUNDERS. I do not recall any such provision.

Mr. THURSTON. The one you have just read. I mean the man that moves into the county.

Mr. SAUNDERS. No; that is a certificate of the treasurer of the other county. It is a special certificate.

Mr. THURSTON. But the legislature having provided that in a particular case where he could not have been on the tax list——

Mr. SAUNDERS. He might not have been on the list in the other county.

Mr. THURSTON. I am talking about the tax list at the polls. That in such a case, growing out of the necessities of the case, the legislature has provided that he may exhibit a certificate of the payment of his taxes, that that particular class of persons may.

Mr. SAUNDERS. Yes.

Mr. THURSTON. And does not that negative the idea that the legislature ever intended that any voter——

Mr. SAUNDERS. We are not dealing with the legislature——

Mr. THURSTON. I am talking about the legislature.

Mr. SAUNDERS. But the legislature could not reach this other class of cases, because it has nothing to do with them. And, as the judge has pointed out, if you are required to be on the list by the constitution, there is no power given to the legislature to modify or abrogate that requirement.

Mr. THURSTON. Is this act of the legislature then unconstitutional?

Mr. SAUNDERS. No; the legislature simply provides a mode of proof, but not an exclusive mode, for a certain class of cases. I do not think the statute is unconstitutional at all; I think it is all right.

Mr. THURSTON. The legislature has provided for a tax list. It has provided——

Mr. SAUNDERS. For a certificate.

Mr. THURSTON. No, for a tax list—as well as the constitution. Now, it is provided that that tax list shall be conclusive evidence of the facts therein stated.

Mr. SAUNDERS. Yes.

Mr. THURSTON. Then it is further provided that in the case of a man from another county, who could not get on the tax list, that he may present a certain certificate from a treasurer which shall be received as conclusive evidence of the fact that he has paid his poll tax and is entitled to vote.

Mr. SAUNDERS. But——

Mr. THURSTON. Is not that necessarily——

Mr. SAUNDERS. But——

Mr. THURSTON. Wait a moment.

Mr. SAUNDERS. I beg your pardon; I thought you were through.

Mr. THURSTON. And does it not follow that the legislature having made the exception in the one case did not intend to make it in everybody's case?

Mr. SAUNDERS. It seems to me that the legislature has merely undertaken to provide a method of proving payment, as an aid to the voter and as a matter of convenience, just as the constitution contemplates that the list will be an aid to the voter, not a stumbling block. If the voters who had paid in another county could get on the list in the second county by taking the steps provided for in section 38, as suggested by Mr. Bennet, it would be noted that there would be no necessity for the statute. If the constitution contemplated that they should get on the list in this way then the statute is unconstitutional. I will now proceed with Judge Campbell's opinion:

> Nor does said certificate state that he is, nor could he be on any such list if he has resided in different counties, during the next three preceding years, for the treasurer of neither could know that he had paid the state capitation taxes, or had paid then personally, except in his own county, and hence he could not put him on the list required to be made up of persons who had personally paid the poll taxes with which they were assessed and assessable for the next preceding three years to the election and at least six months prior thereto. He could not know the facts.
>
> If the second paragraph of section 38 of the constitution was intended to make the treasurer's list the sole evidence of the prepayment of the required state capitation taxes for the purpose of enabling a registered voter to vote, will it be contended that the very next paragraph giving the legislature power to prescribe "further evidence" of such prepayment as a prerequisite to voting was intended to give the legislature the power to annul such constitutional provision?
>
> Yet such would be the effect if said section 86 of the Code providing for a treasurer's certificate as evidence on which to have the right to vote, is constitutional. Certainly it seems to be in exact conformity with the authority given by the constitution, and if the evidence furnished by the treasurer's list and that furnished by the treasurer's certificate are both to stand, it can only be because the treasurer's list is not intended to be the exclusive evidence of the payment of the capitation tax for the purpose of voting. If it is argued that it is an exception to the rule, then the legislature can go on multiplying exceptions under the same authority until the treasurer's list would be but one of many evidences of the payment of the requisite poll taxes "for the purpose of voting." Nor does this take account of other exceptions now existing, such as the "old soldier," who can vote if registered, yet need not be on the treasurer's list, and one

who comes of age at such time that no poll tax shall have been assessable against him for the year preceding the year in which he offers to register, but who has registered under section 20 of the constitution and can not be on the treasurer's list, yet is entitled to vote by virtue of section 21.

Again, if the treasurer's list is the only legal evidence—with the exceptions above named—of the persons entitled to vote, there would be two classes of persons who, though qualified in every other respect, could not vote—first, those who had been returned delinquent for nonpayment of capitation taxes, and who, under section 608 of the Code, can thereafter pay them to the clerk of the court. He can not pay them to the treasurer, and the treasurer can not put him on his list, but the clerk is required to enter "in a book to be kept in his office for the purpose," the name of the party paying, the amount paid by him, and the date of such payment. By paying six months prior to the next election, the voter, if qualified by registration, would clearly be entitled to vote under section 21 of the constitution, would show it by the clerk's records, if not by his receipts, and yet has no way to get on the treasurer's list, and if that is essential, is deprived of his right to vote though he has done everything he can do or is required to do.

Second. Those who have paid the required capitation taxes to the treasurer, within the required time, but have been erroneously omitted from his list, and from any cause or causes have not applied to the court or judge within thirty days from the posting of the list to have it corrected and his name entered thereon as provided by section 38 of the constitution and section 86b of the Code. By section 38 of the constitution the treasurer must file the list (of those who have paid their state poll taxes as prescribed) with the clerk at least five months before each regular election, the clerk within ten days from its receipt, must make and certify a sufficient number of copies, and deliver one copy for each voting place to the sheriff of the county or sergeant of the city, who must without delay post one at each voting place, and within ten days from the receipt thereof must make return on oath to the clerk, of the places and dates of each respective posting——

The court now goes into details:

"And *within thirty days* from such posting any person improperly omitted from such list may apply to the court or judge to have the error corrected and his name entered on the list. After such thirty days there is no way provided to correct the list, though at least three months and ten days must yet elapse before the day of election. The treasurer *might* file the list six months before the election, though only required to do so at least five months before, and thus only the utmost vigilance of the voter in watching through a period of fifteen days for the filing and then the posting of the list would enable him to certainly get on such list if he had been improperly omitted therefrom.

He might be absent from his county or city during the entire period of thirty days allowed for correcting the omission, or might otherwise without his fault be ignorant of the time of posting and lose the benefit of the thirty days for correction, and yet he would lose his right to vote if the presence of his name on the list is the sine qua non of his right to vote. This, too, though from three months and ten days to four months and ten days must yet elapse before the date of election. An interpretation of the meaning of section 38, which would exclude from voting these two classes of persons who had complied with the conditions of section 21 of the constitution, would be harsh, illogical, and unreasonable.

Such an interpretation would place an obstacle, insurmountable as to one class, in the way of the voter exercising his right to vote, given by section 21—would hamper him, not aid him.

My understanding of the objects of section 38 is quite different—that a principal object is to aid the voters and the judges of election in casting and receiving, respectively, the vote at the election and not to make a "hard and fast" rule to the detriment of the voter's rights.

The qualified electorate under the new constitution being greatly limited and conditions being attached to the exercise of the elective franchise as to payment of state capitation taxes—requiring personal payment, payment for certain years, and payment at least six months prior to the election—it is quite manifest that some general and conclusive rule as to the evidence of these facts had to be provided to satisfy the judges that the persons offering the vote were entitled to do so, and to save the latter from the trouble, delay, and possible difficulty of proving the necessary facts to the satisfaction of the judges of election by separate evidence in each individual case. An election under such conditions would have been burdensome to judges and voters alike, troublesome, protracted, and possibly difficult of completion at precincts with a large registration. Hence the provision by section 38 for

the treasurer's list of those qualified by payment of poll taxes, the posting and publishing of same for both general and special information and notice, the right to amend by having omitted names entered thereon, and the making of such list conclusive evidence of the facts therein stated for the purpose of voting. The registration list and the treasurer's list—subject to the right and duty of challenge of any voter under section 126 of the Code—thus furnish the judges of election substantially conclusive evidence of the right to vote of actually or approximately every qualified voter. Those who by error or inability are not on, or can not get on, the treasurer's list for the reasons hereinbefore specified would be left to the inconvenience of furnishing in each case evidence satisfactory to the judges of election of their right to vote.

For the reasons given I am of opinion that the qualified voter has the right to furnish such evidence and to vote thereon, and that it is not essential and not intended by the framers of the constitution that he should be on the treasurer's list as a condition to his right to vote.

Mr. Nelson asked me whether we wanted to make it easier for the parties to vote. In my view, that was the purpose of the constitution, but if that instrument is construed in conformity with contestant's view it will hamper, not aid, the voter.

Mr. NELSON. Is it not a general rule all over the country that the requirements shall be interpreted favorably to voting?

Mr. SAUNDERS. Yes; that is the general proposition.

Mr. CARRICO. What is the date of that opinion?

Mr. SAUNDERS. It was rendered at the November term of the Franklin circuit court, November, 1909.

Mr. CARRICO. Our courts have held the opposite. Judge Jackson and Judge Massey have held the opposite in an oral opinion.

Mr. SAUNDERS. Those rulings have not been published. I wish to file as a part of this record Judge Campbell's opinion.

Mr. BENNET. Has there been an appeal from those decisions to a higher court?

Mr. SAUNDERS. No. The rights of the voter were enlarged by this ruling. He was satisfied on this point.

Mr. BENNET. A man that is beaten in a law suit is always liable to appeal.

Mr. SAUNDERS. But the question presented was the right of a voter to vote who had paid his taxes but who was not on the list. That was the issue presented to the courts. I don't know, of course, whether the opinions referred to by Mr. Carrico were well-considered opinions. They may have been what are commonly called offhand or horseback opinions. The opinions which I cite relate to a point which was vital to the case in which it was considered. This feature of these cases was exhaustively argued, and in the opinion at least of the court in Franklin County, is elaborately discussed.

Mr. CARRICO. As there was no written opinion in this case cited by Judge Jackson, I will state that there was something like 150 names left off the poll-tax list in Wythe County. Notice was given and the judge was applied to to put these men on the list. The notice was given within thirty days, but the application was made to him after the thirty days had expired. He held in that case that he could not consider the application because the application was not made there within thirty days, as well as the notice being given to the treasurer, and that therefore these parties could not get on the list, and, further, that they were not entitled to vote.

Mr. SAUNDERS. That would be, of course, an incidental holding on the part of the court so far as the right to vote was concerned, because that question was not before the court. Naturally the court

would not give the same thought to that question when considering the right to go on the list as was given to him by the other judges when that question was presented to them for decision, as a vital feature of the case before them.

Mr. NELSON. You refer to your judges.

Mr. SAUNDERS. I mean my circuit judge, and the corporation judge for Staunton.

Mr. NELSON. Do you mean that there is any conflict between counties or parties on this question?

Mr. SAUNDERS. None in the world. There may be differences of judgment on the part of the judges; there is no conflict of jurisdiction.

Mr. NELSON. Of counties or parties, you mean; and simply a judge happens to decide one way in your county and otherwise in Mr. Carrico's county.

Mr. SAUNDERS. That is true, but the point decided in my county in an election contest does not appear to have been litigated in Grayson.

Mr. CARRICO. Yes, sir.

Mr. SAUNDERS. We have many nisi prius courts in Virginia. We call them circuit and corporation courts. Their jurisdiction is extensive.

Mr. CARRICO. The judge will agree with me that our courts of appeal have never passed on it.

Mr. SAUNDERS. Yes, that is true.

So much for my contention as to the tax list, which I think is fairly established. I wish now to present the law proper to be applied to the consideration of the contested votes. It seems to have been the idea on the part of the contestant that all that it was necessary for him to do in this contest was to suggest a doubt in connection with some particular vote, and forthwith the burden of proof would be shifted to such an extent that contestee would be charged with the necessity of proving that the voter under challenge was qualified.

Mr. THURSTON. One moment, before you pass from this other question. You have asserted that the young men becoming of age and who would be required to pay $1.50 apiece poll tax could not be on this tax list.

Mr. SAUNDERS. That was after the 1st of May. He could be on it if he paid at an earlier period of the year.

Mr. THURSTON. He does not have to pay it if he becomes of age in the year.

Mr. SAUNDERS. Oh, yes, he does.

Mr. THURSTON. Oh, no.

Mr. SAUNDERS. Not contradicting you on other propositions, I think when it comes to a matter of Virginia law that I will venture on that liberty.

Mr. THURSTON. He has to pay $1.50.

Mr. SAUNDERS. That is all that is required of him.

Mr. BENNET. Then if he becomes of age, say, in July of the year——

Mr. SAUNDERS. If he became of age on the 31st of October he would have to pay the capitation tax to vote.

Mr. BENNET. When and where would he pay it?

Mr. SAUNDERS. That is prescribed by the statute.

Mr. TOU VELLE. How would he get on this list?

Mr. SAUNDERS. He would not get on the list.

Mr. THURSTON. The statute has provided for his case and also for the case of the man who moves into the precinct.

Mr. PARSONS. The question I wish to ask you there is this. In case of a young man, is not the list already printed and sent out?

Mr. SAUNDERS. That is what I told Senator Thurston. If he paid prior to the 1st of May he would be on the list, but if he paid to the treasurer subsequent to that date he would not be on the list.

Mr. THURSTON. And in that exceptional case the law gives him the right to use the treasurer's certificate instead of the list?

Mr. SAUNDERS. Section 26 of the constitution merely gives him the right to vote on the payment of $1.50. It does not provide how the payment shall be established.

But to take up the other matter. Suppose a man is admitted to vote who has not been challenged. What are the presumptions in favor of that vote? Here is what the law says in that connection:

All votes recorded on the poll list should be presumed good, unless impeached by evidence. (Potterfield *v.* McCoy, 14th Cong.)

Votes having been received at the time of the election, the petitioner is entitled to them, unless they are proven to be bad. (Newland *v.* Graham, 24th Cong.)

It is the settled law of elections that where persons vote without challenge it will be presumed that they were entitled to vote, and that the sworn officers of the election who received their votes performed their duty properly and honestly and the burden of proof to show the contrary devolves on the person denying their right to vote. (Findley *v.* Bisbee, 45th Cong.)

If a person votes at an election, his vote is presumed under the law to be legal, until the contrary is proven in a legal way, for two reasons: First, the acts of the officers are presumed to be honest and correct, until the contrary is made to appear. Second, the presumption is that a man would not cast an illegal vote. (Id.)

A vote accepted by the judges of an election is prima facie legal. Before it can be thrown out, it must be shown that it was illegal, that is to say, the presumption of legality must be overcome by a clear preponderance of competent evidence. By competent evidence is meant such evidence as would be admitted before a judicial tribunal on the trial of the issue, unless the nature of the issue would render a relaxation of the rule necessary and proper. (Smith *v.* Jackson, 51st Cong.)

Every reasonable intendment should be indulged in favor of the voter. (Craig *v.* Stewart, 53d Cong.)

Where votes were refused on election day by the judges, the presumption is that the judges did their duty, and the votes were legally excluded. (Garrison *v.* Mayo, 48th Cong.)

The evidence that an election officer erred in rejecting a vote must be clear and conclusive. (Frost *v.* Metcalfe, 45th Cong.)

Where suggestions, according to which a man may have been a legal voter, were not negatived by the evidence, it was presumed that they could not be, and the vote was allowed to stand. (Arden *v.* Allen, 34th Cong.)

Suppose we apply the principle of presumptive regularity to some of the votes which contestant has challenged.

Take the most common form of challenge, that of a voter who appears to have voted, but who is not on the tax list for that district. Does that fact prove that this was an illegal voter, and shift the burden of proof? Not at all, though my counsel in the counties seemed to think that this mere suggestion required them to take an immense amount of counter testimony involving a great deal of trouble and an amount of expenditure far greater than will be covered by my allowance for costs in this case.

The mere fact that a voter was not on the tax list for three years, even if that was a prerequisite, is far from proving that he was an

illegal voter. He may have been an old soldier, and not liable for poll tax. He may have paid his taxes in another county. He may have become 21 since May 1 of the year. He may have paid his delinquent taxes to the clerk. He may not have been liable for taxes any further than he was on the list, say, for one or two years, as the case might be. Until all of these possibilities are excluded by the evidence of the contestant, the vote will be allowed to stand. And if presence on the list was not a prerequisite, contestant *in addition* would have to prove that the voter had not paid his taxes.

Let me show you how this record is made up. The mere fact that a man is not on the tax-paid list is in numerous cases considered to be sufficient authority for the contestant to charge that he is an illegal voter, and voted for me—without even undertaking to prove that the voter is a Democrat, much less that he voted for contestee. It has given me a great deal of trouble to run down in the Record all the voters who have been challenged in this way, and to group the evidence relating to them.

Contestant charges that at Lindsey's precinct "D. W. Harrison, registrar for the precinct, voted for contestee, and was not tax paid."

There is not a particle of evidence in the Record that Harrison was a Democrat, much less that he voted for me. Does contestant maintain that the mere fact that this man was a registrar sufficiently prove that this man was a Democrat, and voted for me? Do you rely on the fact that he was registrar to prove that he voted for me, and that he was a Democrat? Is that your contention?

Mr. PARSONS. There is not a Republican registrar in the fifth district.

Mr. SAUNDERS. Well, there may not be just at this time, but the Record shows that in the county of Grayson at Troutdale there was a Republican registrar for a number of years. (See Record, Pasley's testimony, p. 307.)

Mr. PARSONS. I say at this time.

Mr. SAUNDERS. Possibly not at this time, though I can not say as to that. But if there have been Republican registrars, why may not this man Harrison be one? For years at Troutdale there was a Republican registrar, a man named Greer.

The CHAIRMAN. Were there any at this election?

Mr. SAUNDERS. I don't know whether there were or not. I do not know the politics of the registrars in the district, which is a large one, but it was brought out that for years the registrar at Troutdale, a large Republican precinct, was a Republican.

The CHAIRMAN. Do you know of any now?

Mr. SAUNDERS. I don't know the politics of any of them, except in my own county. Contestant merely proved that Harrison was a registrar, and not on the tax list. He did not even prove that he voted. Is the committee going to hold that such evidence proves that Harrison was a Democrat and voted for me? If that sort of proof goes, contestant could prove his case without difficulty.

Mr. NELSON. Speaking of that question, of Democrats and Republicans, I would like to have you touch upon this question, and perhaps you will touch upon it anyway: I would like to know how can we judge how they gave their votes from the mere fact that they are proven to be Republicans or Democrats? In my section of the country the fact that a man is considered a Democrat or a Republican does not necessarily show how he votes at any particular election.

Mr. SAUNDERS. No, you can not prove that a man voted for the Democratic or Republican candidate merely because in a general way he is a Democrat or Republican. At the last election at my own precinct I got 161 majority, while Bryan received only half that number. As a sort of general proposition, you might say that the Democrats vote the Democratic ticket and the Republicans vote the Republican ticket, but there are many departures from regularity. The subcommittee which counted the ballots will recollect that they found all sorts of split tickets—Bryan-Parsons ballots, Taft-Saunders ballots, and so on. This was true at many points in the district.

Here is the evidence as to this man Harrison (I read from the Record, page 445):

Q. Who is the regularly appointed registrar for Lindsey voting precinct in Pine Creek magisterial district?—A. At this present time?
Q. Yes.—A. I think it was G. W. Harrison; I think.
Q. That was for the year 1908?
A. I am not positive about that, but I think G. W. Harrison was the last one.
Q. Examine the tax-paid list and see if he is a qualified voter for that year. See if he appears on the tax-paid list for Pine Creek as a qualified voter in the November election, 1908.
A. I don't find his name on the tax list of 1908.

Contestant does not find this man's name on the tax-paid list, and thereupon, on the strength of that and the fact that he is a registrar, the brief claims that Harrison voted for me. Ex uno disce omnes.

However, let me present to you another illustration or two of the reckless manner in which votes are claimed to be illegal and then charged to me. Come to the county of Franklin. I will take a case or two from that county.

"W. B. Wood voted for contestee without payment of tax as the law required." (Contestant's brief.) Well, that is true, and Wood was an incompetent voter. I do not mean to say that his incompetency carried any moral obliquity with it. This man had not paid his taxes, and was an illegal voter. But that came about in this way: He had been relieved of payment of taxes for physical disability. He had been relieved by the court under the old constitution. Under the new constitution the registrar thought he was still exempt, so he was allowed to register as exempt and has continued to vote to the present time, without the payment of taxes. But the registrar was in error in this. I agree with contestant that Wood had no right to vote. But there are seven Republicans in Franklin who have been voting under precisely the same circumstances as Wood. (See Analysis, p. 123.)

Take another case [referring to the brief of the contestant]. Take J. C. James. That is an interesting case, by reason of a statement that Mr. Carrico made the other day.

He was complaining that a man named Quillan, who, he said, had presented his transfer on election day, was not allowed to vote. Well, the judges erred in refusing to receive Quillan's transfer, but the judges in Franklin who received transfers on election day are attacked by contestant's counsel in that county. James's case is one of these cases. There are others.

The statute which I have cited in the analysis (see Analyis, p. 6, sec. 125), expressly gives a voter, moving from one district to another

within the county, the right to give in his transfer on election day, have the same entered, and vote on it. Contestant charges that J. C. James voted for me. The evidence does not show anything of the sort. It does not even prove that he is a Democrat. J. C. James voted on a transfer which was entered on election day. He is challenged on that ground. The action of the judges in admitting James to vote was clearly legal.

Mr. CARRICO. He was transferred four or five days before the election.

Mr. SAUNDERS. The evidence does not show that. His transfer may not have come into his possession until three or four days before the election. Transfers are frequently secured at the proper time by the party managers, and not delivered until within a week or so of the election if it is not convenient to do so. There is no reason why they should be delivered sooner.

J. C. James, P. B. Stanley, and his son, and W. A. Mills are all challeged on the ground that their transfers were received on election day, and yet contestant complains because Quillan's transfer was refused under the same circumstances. As a matter of fact it was legal to receive the transfers of the two Stanleys, Mills, and James, and illegal to refuse Quillan's.

The testimony regarding James will be found on page 141 of the record.

He was not on the books, and the judges put him on the books.

Take the case of Cleve Coleman.

Mr. CARRICO. I have found that now, and would like to read it just to show you that my contention was correct. This is page 141 of the record.

A. I objected on the ground that he voted on a transfer brought in on the day of election, and on the Saturday or Monday before election, when he was hauling poles down to my siding, I asked him was he coming to the election on Tuesday, and he said he reckoned not; he didn't have any vote. And I just asked him in a jocular way if he had been dehorned, and he says no; he says, I haven't my transfer; I have been voting in Dillon's Mill, and says I haven't been transferred. He says Mr. Dillon promised to send my transfer down there to vote for his brother. I promised him to vote for his brother, but he never done it in time for last election, and just neglected, and I haven't got it by this time. I don't reckon I will be at this election. On election day, at about two o'clock in the evening, he came in with his transfer; I think the date of his transfer was the 28th of September.

Mr. SAUNDERS. There is no difference between us as to the testimony. [Reading from the record of the testimony, p. 141:]

Cross-examination by Mr. DILLON:

Q. Your statement is, then, that Mr. James presented himself to the judges with a duly-issued transfer, dated September 28, 1908?

A. That is my recollection.

Mr. SAUNDERS. Garst, the witness, and Republican judge at that point, put the objection on the ground that the judges had no right to enter any transfers on election day. Read the conclusion of Garst's testimony.

Mr. CARRICO. No, I do not raise it on that ground.

Mr. SAUNDERS. Well, contestant's counsel in Franklin County put the objection on that ground.

Mr. CARRICO. I raise it on the ground that if he didn't have it a week before that, that it looks like it might be dated back.

Mr. SAUNDERS. Well, there is no evidence whatever to support that contention. It is a very common thing—I have no doubt it is done in your county and in every county in the district—with respect to transfers for the party chairmen to go ahead and secure the transfers in time. Later they send them to the parties and it makes no difference whether the parties receive them or on before the day of election. They can be entered at any time up to the last minute of the day of election.

Now, to get back to Cleve Coleman's case. Contestant claims that Cleve Coleman voted for the contestee, and gives one reference to support the charge.

The CHAIRMAN. What page?

Mr. SAUNDERS. Pages 145 and 146 of the testimony. There are about six references that ought to be given in this connection, and which are given on page 96 of the analysis. So far from this man's voting for me, the man himself swears that he voted for Parsons.

Mr. PARSONS. Would you mind telling the committee in that connection that he told just before he went in, that he said he intended voting for you, and took a Democratic judge in to mark his ballot? I ask you to read the evidence.

Mr. SAUNDERS. Do you suppose the committee will regard anything of that sort, when the man himself swears that he voted for you? You tried to prove that he was a Democrat and failed. He was an independent. Of course the committee will read the evidence. They will find all the references to the witnesses on page 96 of the analysis.

These cases are typical of the reckless manner in which contestant alleges that voters are disqualified, or that disqualified voters voted for me. In Coleman's case the man himself says he voted for my opponent, yet he is charged to me. Contestant seems to think that when he proves that a Democratic judge marked a man's ballot he has adduced evidence that the voter voted for me. The fact shows nothing of the sort. The conclusion drawn is utterly unwarranted. The record shows that in many instances the Republican judges marked the ballots of both Democrats and Republicans. And why should they not? For instance, at Martinsville, it appears from the testimony of English, the Republican judge, that he marked the ballots of lots of Democrats as well as Republicans. Analysis, page 40. At Dillons Mill, a man named Green voted for Parsons, but got the Democratic judge to mark his ballot. At the same precinct, Tinsley, the Republican judge marked the ballots of many Democrats. Analysis, page 40. In Grayson, Spencer, a Republican judge, marked the ballots of many Democrats, and one of them, a man named Mikel, voted for Parsons. Analyis, page 40.

This evidence clearly shows that you can not deduce the character of a man's ballot from the political affiliations of the judge who marked his ticket.

I want to call the attention of the committee to an interesting situation at Hillsville, in Carroll County. There are four voting districts that run together in Hillsville, and the point of convergence is the county court-house. The town of Hillsville is all around the court-house, and the voters of the four precincts all vote in one room in the court-house. There is a young man in Hillsville who lived for quite a number of years in one part of Hillsville, which was in one precinct. Later he rented sleeping quarters in another part

of the town, which was in the second precinct. He took his meals in still another portion of the town, which was in the third precinct. He kept his taxes paid up in the first precinct and voted there in the court-house. Upon this state of facts he is challenged as an illegal voter, but it is not shown that he voted for me.

Mr. CARRICO. He neither voted where he ate, nor where he slept; he voted in the third precinct.

Mr. SAUNDERS. What difference does that make? He ate at one place and by walking across the street he was in another district. In that district he kept his taxes paid up and maintained his residence. Should he have voted where he ate, or where he slept, or where he practiced law, which was in all three precincts, or where he paid his taxes?

The CHAIRMAN. I want to ask about section 21 of the constitution. I don't know certainly whether it is 21 or not, but the provision in reference to registering.

Mr. SAUNDERS. That is the section you have in mind.

The CHAIRMAN. It says, provided if they register after the first day of January, 1904, he shall, unless physically unable, prepare and deposit his ballot without aid, on such printed form as the law may prescribe, but no voter registered prior to that date may be aided in the preparation of his ballot.

Mr. SAUNDERS. I stated that provision heretofore.

The CHAIRMAN. Why should he have aid?

Mr. SAUNDERS. Simply because the constitution provides that one class shall have aid and the other shall not.

The CHAIRMAN. But what excuse is there for it, what reason is there for it?

Mr. SAUNDERS. I am glad you asked me that question. The difference was made by the constitution for the following reasons: Many of the men who registered prior to 1904, can not read or write. Some of our best citizens among the older generation, men of good property and fine capacity, owing to lack of early opportunity, can neither read nor write.

The CHAIRMAN. Why should there be a discrimination between a man who could not read and write——

Mr. SAUNDERS. It is not a discrimination. It is merely a saving provision in the interest of an older class. Under our present policy in Virginia we are seeking to bring about universal education, certainly in reading and writing. As an inducement to that end the gift of the ballot is made dependent upon the capacity to do both. Moreover, to make a man disposed to pay his capitation taxes, which are made a prerequisite to voting, every dollar of that tax is appropriated for the cause of public education. The conditions under which the older generation grew up were different. Educational opportunities were inadequate, but there is no reason why any man who attains his majority at the present time should be illiterate. Our educational facilities for everyone are ample and abundant and continually expanding.

Mr. HOWELL. He would not be able to register unless he could read and write.

Mr. SAUNDERS. No. That is the reason he does not need any aid in marking his ballot.

Mr. BENNET. Can not even an old soldier register now, if he can not read and write.

Mr. SAUNDERS. No.

Mr. CARRICO. How can an old soldier register now?

Mr. SAUNDERS. He can not, if he is unable to read and write. But they are practically all registered.

Mr. BENNET. So if either a Union or Confederate soldier came into Virginia from Tennessee, we will say, and he could not read or write, he could not register?

Mr. SAUNDERS. No, he could not register. But as a matter of fact they have all been long since registered.

Now, I want to call your attention to one further feature of this case which crops out at many points. It is the alleged disqualification of nonresidence, which is imputed to many voters.

Contestant seems to think that a voter can vote only where he happens to be at the time of election; that if he is away from his domicile in the pursuit of his trade or business or profession, if he is away traveling or prospecting or doing any one of the many things which do not amount to the acquisition of a domicile elsewhere, he has lost his domicile where he had theretofore maintained it and paid his taxes, and can not return there to vote. But it is not an easy matter in Virginia to prove that a man has lost his domicile.

In that respect our Virginia law is a pretty stiff proposition. I desire to call the attention of the committee to that law:

As used in the Virginia election laws, residence is substantially synonymous with domicile, which is residence at a particular place, accompanied with positive or presumptive proof of intention to remain for an unlimited time. A domicile once acquired continues to exist until another is acquired elsewhere; to effect a change of domicile there must be an actual abandonment of the former one, coupled with the intent not to return to it, and also a new domicile acquired at another place, which can only be done by the union of intent and personal presence. Mere change of living place, however long continued, does not of itself constitute change of domicile; and the burden of proving abandonment of the old and the acquirement of the new is upon the party making the charge. In case of doubt the court should resolve that doubt in favor of the vote as cast, and counted, and full proof should be required to vitiate a vote when received and counted.

That is from the Virginia Law Register, page 514, Bruner *v.* Bunting.

Residence within the meaning of the suffrage laws is clearly distinguished from the same word as used in the popular sense, to denote merely the act of abiding or dwelling in the same place. (Id.) The decision of the judges of election, in regard to the residence and qualifications of voters, will not be rejected upon merely conflicting testimony. (Anderson *v.* Reed.) Mere absence, however, long continued, will not make a change of domicile. (Lindsay *v.* Murphy, 76 Va., p. 428.) To constitute a new domicile both residence in new locality and intention to remain there are indispensable. (Id.)

Mr. NELSON. What point are you trying to emphasize by reading that?

Mr. SAUNDERS. There are many cases in the record in which contestant charges that a voter is disqualified on the score of nonresidence. When you come to consider these cases in connection with the law which I am citing, you will find that the evidence to prove nonresidency in practically all of the cases is grossly inadequate. I wish I had time to take up some of these cases in detail.

If a voter at the time of election happened to be working in another district, though he returned to vote where he was registered, and paid his taxes, contestant charges that he was a nonresident. There is hardly a case in the record as to which contestant has furnished any reasonable proof, much less sufficient proof in conformity

with the law of Virginia, to show that the voter whom he challenges has acquired another domicile elsewhere under the law of Virginia, to effect a change of domicile, a new domicile must be acquired elsewhere. (Bruner *v.* Bunting supra.)

Mr. BENNET. Is not residence a mixed question of fact and intent?

Mr. SAUNDERS. That is true; but the requirements of our law with respect to losing a residence are more stringent, perhaps, than the requirements in any other State.

The question of residence is one of intention and the old residence is not lost so long as the animus revertendi remains.

A domicile once acquired is presumed to continue until a new one is shown to have been gained. (Starke *v.* Scott, 78 Va., 780.)

This change of domicile is to be established by the proof of the party asserting it. (Id.) Residence is chiefly a question of intent, known alone to the party. (Frost *v.* Metcalfe, 1 Ellis, p. 290.)

The mere statement of a witness that a man is a nonresident, without giving the facts to support the statement is not sufficient to throw out the vote. Must have intention at time of departure to leave the State, or district permanently, to forfeit his right as a voter. (Letcher *v.* Moore, 23d Cong.)

When you apply these principles to all the questions of residence raised in the record, I submit that you will not have much difficulty on that portion of contestant's case.

And now, to sum up this matter, I wish to call the attention of the committee to one pregnant fact in conclusion, and that is that the contestant can not establish any claim to my seat, save over the prostrate form of some established precedent. By whatever road he seeks to reach his goal, he finds his way barred by some well recognized and vital authority. If he seeks to obtain your decision on the ground that the organic law of Virginia, which provides for the redistricting of the State, has been abused, he requires you to place an interpretation on that instrument wholly at variance with the one afforded by the supreme court of my State in the case of Wise *v.* Bigger, which remits apportionments to the discretion of the lawmaking department.

If this is a function of the legislature in my State, and not of the courts, he does not inform you how and why in the exercise of an exclusive function the former body has commited an unconstitutional act.

If contestant undertakes to challenge my right to sit in this Congress on the ground that the action of the Virginia legislature was contrary to the apportionment act of 1901, he finds himself confronted with the necessity of overthrowing the well established and well reasoned precedent of Davidson *v.* Gilbert, which, upon an identical state of facts and one far more compelling, I may say, than the facts presented in the case in hand, held that Congress had no right to interfere, and in addition advised that if such authority of interference did exist it would be unwise to seek to exercise it. If contestant relies upon the proposition that a State can make but one apportionment within a census period, and that on this ground the Virginia act of 1908 is unconstitutional, he is confronted with a double necessity, first of overthrowing the precedent of Perkins *v.* Morrison, which maintains the contrary with abundant logic, and second of showing that either the act of 1906 or of 1908 was an act of general apportionment.

If without regard to Perkins and Morrison contestant seeks to bring this case within the principle announced in the Indiana and Illinois cases relating to exhaustion of power, he must point out with reference to the Federal Constitution, and acts passed in pursuance thereof, and the constitution of Virginia, how and wherein those instruments have fixed the mode and the time according to which the legislature of our State must make its congressional apportionments. Both of these cases maintain that if some paramount authority has not fixed the mode and the time, the right of the States to make their apportionments with such frequency as they see fit is unlimited.

If he asks this committee to take that view of our constitution which would restrict the exercise of the right of suffrage in Virginia, he flies counter not only to the well-reasoned cases submitted, but to established principles of construction applied to statutory and organic law.

However and from what quarter I may be attacked, I rest my case upon the solid foundation of reason and principle, upon the thoughtful findings of wise and patriotic men who have long since expressed themselves upon the questions which you are asked to thresh anew for the benefit of a contest which is utterly lacking in any real merit.

The main contentions upon which I rest my claim to a seat in this honorable body rest upon well-established precedents, both juridical and congressional. Unlike Governor Montague, I do not undertake to exalt the former at the expense of the latter by referring to the one in terms of excessive praise. I believe in the binding force of judicial precedent, in the judicial sphere, but surely with reference to a contest of this character the thoughtful action of a former House is not to be brushed aside by a derisive reference to it as a political precedent.

It has been argued that without regard to precedent this committee can report in favor of the contestant, and that the House is a law unto itself from which there is no appeal. I do not deny that in a sense this is true, that what it wills the House can do without regard to law or authority. But the suggestion of such a course is a reflection upon the House and this committee, and there is not the slightest ground for believing that either will take any step which will involve a contempt for precedent or a disregard of the requirements of justice. Governor Montague fully realized that the precedents of the House are against the claims of his client. Hence he sought to minimize the binding effect of those precedents by the suggestion that they were partisan judgments. He failed to advert to the fact that Davidson *v.* Gilbert was the finding of a Republican committee in a Republican House in favor of a Democratic contestee. I do not doubt that there have been partisan decisions in the House. I do not doubt that such have been rendered. Courts have rendered partisan decisions, for after all they are human, men of like passions with ourselves. I do not undertake to say that the history of the past has not been marred by political decisions. All parties have doubtless been guilty in this respect. It is too much to expect that human frailty will do justice at all times though the heavens fall.

But we may thank our God that it is no longer true, if it ever was measurably a fact, that a contestant can obtain a seat in this body upon no better ground than that the seat which he claims is held by a member of the minority, who is entitled to no consideration at the

hands of the majority. There is nothing in the history of Congress which is more to its credit than the fact that for some years the decisions of the election committees of this body have justified themselves to all the members of the House by the character of the findings, which have reposed upon the immutable rock of law and justice. These findings have secured universal commendation among patriotic men of all parties. There was one case, at least, which is decisive of this contest and which Governor Montague could not affect with the slings and arrows of his sarcasm or refer its decision to the ground of party exigency. That is the oft-cited case of Davidson *v.* Gilbert, decided by a Republican committee of a Republican House against a Republican contestant.

Mr. Chairman, I am a member of the minority party. There are no political influences or considerations to be urged in my behalf. I stand on the merits of my case, and asking nothing save justice, I have no reason to believe that I will fail to receive that justice at the hands of this committee. You are Republicans, at least a majority of the committee are Republicans. I am a Democrat, and as a general proposition I support those measures which are popularly called Democratic. In the same general way you support those measures to which your party is committed. In that sense we oppose each other. But there is one common ground on which we meet, on which we all stand, and that is the ground where justice is done and party considerations are discarded for action under a higher and paramount law. In recent years two election cases from my State attracted a great deal of attention. These were the cases of Walker *v.* Rhea. Walker had been a Member of this body and pressed his claims with great vigor, alleging fraud and many other grounds of contest. In each instance the vote had been close, and there were many elements of the contests which appealed to what may be styled the sympathetic consideration of contestant's party friends in this body. But the scales of justice were held with even poise until the law and the evidence inclined them on the side of the contestee. Justice was done under the law. General Walker was a man of large ability and influence. He presented a case each time which, according to the report of the committee, showed that there had been a measure of fraud on the part of some friends of the contestee. And yet after a full hearing the contestee was seated in both contests by a Republican House.

I cite these things to show that in the past decade at least, in spite of the insinuations of Governor Montague, the action of this body in election cases and the findings of the election committees of this House are not to be shaken as to their binding force and effect as precedents by the suggestion that they are partisan judgments. They have been accepted as just judgments by the country at large.

This is my case, Mr. Chairman; my case on its merits, my case on the facts, my case on the law, my case on the precedents, my case on the Constitution and statutes of the United States illustrated and expounded by the precedents of this House, my case on the statutes and organic law of my own State as expounded by the courts of that State. I say that without fraud, without wrongdoing, without violence, without conspiracy, without misconduct in the conduct of the election in November, 1908, I received a majority of the votes, honestly cast and honestly counted, in the Fifth district of Virginia, and

so receiving them, I received the certificate of election. That certificate I leave in your hands, with the confident assurance that justice will be done. That is my case, Mr. Chairman and gentlemen of the committee.

(Adjourned to meet at 10 a. m. Saturday, March 5.)

COMMITTEE ON ELECTIONS NO. 2,
HOUSE OF REPRESENTATIVES,
Saturday, March 5, 1910.

The committee met at 10 o'clock a. m., Hon. James M. Miller (chairman) presiding.

ARGUMENT OF HON. JOHN M. THURSTON.

Mr. THURSTON. Mr. Chairman and gentlemen of the committee, it is difficult within any reasonable time to recover from the enduring argument that has been presented to the committee, and I confess that in sitting here so many hours it has been almost impossible for me to center my mind as I desired to do upon those few questions which are clearly, and must be clearly, decisive one way or another of the result in this case. However, I shall endeavor to confine myself very closely and not at too great length to those questions, and to those alone, which seem to me to be vital.

In the first place, I shall take up the question as to who are legal voters and what shall be done with a ballot illegally cast, and how the fact of the nonqualification of a voter, making him ineligible under the laws and the constitution of Virginia to cast a vote, may be determined. In the first place, I wish to refer for a moment to the suggestion or to the statement of Mr. Saunders, brought out through a member of this committee, that the whole purpose and tendency of the constitution and the laws of Virginia was to encourage and secure the utmost liberty and freedom and ease of the exercise of the electoral franchise.

I shall not discuss this case in a partisan spirit, and in what I have to say on this particular point I shall speak as far as I am able from the standpoint of a disinterested historian, and not from the standpoint of a partisan interested in any political party of this country. It is a matter of common knowledge, never denied, universally admitted, in one part of the country as well as in the other, that the constitution of the State of Virginia as it exists to-day, in common with the constitutions of several of the other States of this Union, was framed by the most crafty statesmanship and by the highest art of subtle and refined legal ability for the very purpose of making it difficult, if not impossible, for a considerable portion of the electors of those respective States to vote.

Mr. SAUNDERS. Will the gentleman let me interrupt him in that connection?

Mr. THURSTON. Yes.

Mr. SAUNDERS. I do not want to be misunderstood in that connection. I want to be frank. In saying that it is now easy to vote in the State of Virginia, I do not mean to say that we did not have in mind to restrict the electorate by the action of our constitutional convention, if that could be done in a constitutional manner. I

frankly admit that we wished to restrict the number of negro voters if it could be done constitutionally.

Mr. THURSTON. I had no doubt that the gentleman would make that statement.

Mr. KORBLY. I would like to observe that Mr. Carrico made the statement here the other day, and it is in the record, I believe, that this operated to keep out a good many whites as well as blacks.

Mr. THURSTON. I do not believe he made that statement.

Mr. CARRICO. I did make that statement, and I stick to it.

Mr. THURSTON. Whether that be true or not, it was evidently not the purpose of that constitution to do that. The intent and purpose was, and is, as I have stated. But I am not quarreling with it. I do not know that I would have acted differently from what the people of that section of the country did, myself, if I had been there under the same circumstances. But the purpose of these carefully framed constitutional provisions was to exclude from access to the ballot box and from participation in elections, and certainly from participation in the holding of office, a class of people considered undesirable, and possibly dangerous to the continuance of the exercise of political control in the State; so that when they came to frame this constitution they framed it very carefully, not for the purpose of extending the right of suffrage, not for the purpose of making it easy for the ordinary elector to vote, but they framed it in the interest of classes—I am not talking about color—and they made it as difficult as the ingenuity of man could contrive for certain classes of the people otherwise qualified to exercise intelligently and with equality their right to vote. They framed their constitution so as to evade the spirit of the fourteenth and fifteenth amendments, while at the same time it was so skillfully done that the courts of the country could not declare from the judgment seat that they directly violated the express provisions of those amendments.

Now, I am not saying how that operates in the State of Virginia, whether it operates on more colored or more white people, but those constitutional provisions embodied in that constitutional requirement for registration and the manner in which it shall be performed were enacted for the purpose, and do have the effect, of making the exercise of the franchise in the State of Virginia most difficult and uncertain.

Now, let us see if anywhere along the line of their legislation there is a single provision which points out an easy road, for the ordinary man in the community, to the polls where he desires to cast his ballot. The constitution provides that all persons residents of the State two years, of the county one year, and of the precinct thirty days, who have registered and paid their poll taxes as therein required, shall be lawful electors of the State of Virginia, making the matter of registration as therein required one of the original qualifications, or rather one of the essential elements, necessary to constitute a man an elector under their constitution.

Now, that would be all right, that would be open and fair, and that would give everybody the same opportunity if they had, following that provision of the constitution, provided for a registration act that was easily open, easily accessible, and the provisions of which could be easily complied with by all the citizens of the State. I am not here to declaim against an educational qualification as a prerequisite

to the exercise of the right of suffrage, nor am I here especially to raise my voice against the proposition of a property qualification as essential to the exercise of the right of suffrage; and yet in the last analysis, in a great popular government, where power comes from the people and where they are supposed to rule themselves, the rich man and the learned man and the strong man can care very well for themselves without exercising the privilege of his franchise, while the poor man and the ignorant man and the weak man have but little self-protection left in this government, except the right of the electoral franchise and the power that it gives to the individual. They provided in this constitution that all persons should have the right to register during the years 1902 and 1903, and not thereafter, first, who prior to the adoption of this constitution served in time of war in the Army or Navy of the United States or the Confederate States, or of any State of the United States or of the Confederate States.

Having in mind the political and historical history of the State and its present citizenship, we can readily see that that provision was designed to place upon the rolls without any other or additional prerequisites or demand for other qualifications, a very, very large proportion of the dominant citizenship of that State, not speaking now of black or white but of the dominant political citizenship of that State. It was designed for that purpose, to prepare and establish within a short time an eternal registration list which would thereafter remain forever, and make it in the first instance the lever which should retain the electoral power in the hand of the dominant organization of the State of Virginia for all time to come.

I do not know on what theory of making the exercise of the electoral franchise easy it can be said that a man who fought under either flag in the civil war between the States should have any easier access to the polls than a man who did not fight. It can not be justified upon any other theory except that underlying its enactment was a desire and the intention and a purpose of maintaining the dominance of one organization in the State of Virginia, to place upon the permanent rolls of that State, in the first instance, so large a proportion of the people of that State who were certain to remain true to their political allegiance, that thereafter there could be no overturning of political supremacy in the State.

Second, a person could register who owns property, upon which, for the year next preceding that in which he offers to register, state taxes aggregating at least one dollar have been paid. I have said all that I care to say about that. Personally, I do not believe in a property qualification. I do not believe that a man who owns a jackass has any more right to vote than a man who does not, and I believe that when you take the situation of a man who owns a jackass and can vote and that of a man who does not own a jackass and who can not vote, it is a very doubtful proposition whether the man or the jackass is exercising the political franchise. But I say that these provisions were all put in there to secure political domination. I am not saying that they were put in there solely as against the colored vote in the State of Virginia. The same necessities have not existed; the same conditions have not existed in the State of Virginia that have existed in some other States of this country where, for reasons that I am not here to question, the dominant people of those States have felt compelled to enact constitutions and legislation that would exclude from the polls the great body of the electors of the State.

The next clause is that a person could register who was able to read any section of this constitution submitted to him by the officers of registration, and to give a reasonable explanation of the same.

You will see that the first two qualifications were all that were necessary to enable persons to place themselves upon the permanent rolls of the State. Upon this last section I desire to comment just for a moment, and I would not have branched off onto this line of discussion at all if it had not been for the assertion based upon a question which seemed to indicate that there might be involved here a determination as to whether or not the policy of Virginia election legislation was intended to make the road to the polls straight and easy. Now, think for a moment what this provision is. We must deal with existing conditions as they are to-day, and as they were when this constitution was adopted.

It has already been stated here, and it is known, that the entire state government of Virginia is in the hands of one party; that all the judges on the bench of the State of Virginia are members of one party. They are good men, and I do not charge that judges on the bench in their judicial capacities will act unjustly, intentionally, because of partisanship and outside influences, but I do know, and you know, that woven in the warp and the woof of every human character is partisanship, political, social, and domestic, that in a measure, and often in a large measure, guides and directs what are supposed to be the most deliberate judgments of men. The judges appoint the political council—I call it that—in every county or city of the State. There is no provision in that act that any one of this council shall be of a minority party; and you have heard statements here that as a matter of fact the party in power having the appointment of those election councils retains—appoints and retains—the members of their own party, as they have a right to do, a legal right to do; I do not question it. But I am showing how difficult they have made it for anybody, especially for a man not well up in educational advantages, to find his road to the polls.

These political councils in each county appoint the registrars, and all of them. From the dominant party executives of the State to the judges placed upon the bench by the same dominant party, to the political councils of each county of the same dominant party, and down to the registrars, in fact, all the election machinery of the State of Virginia has been placed, and placed not for temporary use, but in the expectation of preserving its perpetuity, in the hands, and in the exclusive hands, of the members of the dominant party. Now, here is where the nigger is in the wood pile. I am not using that expression to refer to the question of black or white down there, but in a figurative sense. A person who was not an old soldier of the nation or of a State, or who had not paid a dollar tax on his property for the year before was required to be able to read any section of the constitution submitted to him by the officers of registration and to give a *reasonable* explanation of the same.

Stop and think about that; what a power that put into the hands of the registrars of that State. The constitution provides that a man can not vote unless he is on the registration list. The registrar sits there as the sole judge. He is vested not with mere executive power, but with a judicial and discretionary power, after hearing this man read a section of the constitution, and after hearing his explanation

as to the meaning of it, to decide whether he is qualified to vote. He is vested with an absolute, a complete, a final judicial and discretionary power——

Mr. SAUNDERS. No, no.

Mr. THURSTON (continuing). To decide that that man has explained that section of the constitution according to his satisfaction or not.

Mr. SAUNDERS. Pardon me, Senator; his power is not final. The voter had a right to appeal to the court.

Mr. THURSTON. Not final, because he may appeal to the court; but final for the purpose of placing his name on the registration book at that time, or of excluding him.

Mr. SAUNDERS. No, sir; if you will pardon me, anybody who is excluded as of that date had an absolute right of appeal to the circuit court.

Mr. THURSTON. Yes; I say it is a final power to enter up a judgment at the time, admitting or excluding the party from a place upon the registration book. It is true that the right of appeal is given to this poor man who has not been able to explain a section of the Constitution of the United States or of the constitution of the State of Virginia satisfactorily to a registrar before whom he has appeared; but what is that to the poor man? What remedy is that to the man who may be excluded?

How many of us could satisfy a registrar in the State of Virginia as to the true intent and meaning of any section of the Constitution of the United States or of the constitution of the State of Virginia? Why, Mr. Saunders has spent hours, even, attempting to convince this committee that he understands at last what the meaning of one particular section of the constitution of Virginia means, and I doubt if even Judge Saunders, with his persuasive, and I might say almost perpetual, eloquence, could convince against his will a registrar of an opposite party in an election contest that he understood a provision of the constitution of the State of Virginia correctly so as to entitle him to be placed upon the rolls.

Mr. KORBLY. Mr. Thurston, do you maintain that the people of this country at large do not possess an adequate knowledge of their guaranteed rights under the Constitution?

Mr. THURSTON. No; but I claim this, that when you place it in the power of one man sitting as registrar, without any particular responsibility of office, without any penalty imposed upon him for deciding incorrectly, a political registrar, the creature of a political party, undoubtedly carrying into the exercise of his duties in that position whatever political bias he may have—when you place in his hands the power of saying that this man's explanation is correct or that that man's explanation is not correct, you place the most dangerous power in the hands of the most subordinate officer that I can conceive has ever been vested in an official, high or low, in this country; and, as a matter of fact, if those registrars desire to use their office for political advantage of their own political party, it is in their power to do it to an extent that would forever prevent a minority party in the State, or in any district of Virginia, from having an equal and fair opportunity at the polls.

Mr. KORBLY. I do not want to take up your time, but is that in the original preparation of the poll list?

Mr. THURSTON. That is in the original preparation.

Mr. KORBLY. Afterwards can they not get on by making some sort of application?

Mr. SAUNDERS. If the Senator will permit me in this connection, I would say that the present law is absolutely different from that. Of course I do not want this to be taken out of Senator Thurston's time at all, but his argument has taken a direction absolutely unindicated by anything that has gone on here before. That we would enter upon a discussion of the constitution of Virginia with respect to its establishment, and the considerations which brought it about, was not indicated in the oral arguments that preceded him. I simply wish to say again, with respect to the election laws of Virginia, that what I said yesterday refers to present registrations. I did not discuss registration under the constitution.

The present provisions for getting on the registration books are easy. It is not difficult to pass the tests imposed for registration, and thereafter it is a mere matter of paying an annual tax of $1.50, all of which goes to the school fund for educational purposes. There has been no unfairness on the part of the registrars throughout the district in enforcing the law and admitting parties to registration. The evidence in the record for Henry County shows that the bulk of the new registrations in that county are Republicans. Quite a number of them are negroes.

Mr. THURSTON. I am not here criticising the right of the dominant party of the State of Virginia to enact these constitutional and statutory provisions, nor am I here insisting that in any particular case, up to the present time, any registrar has been biased or prejudiced in his judgment upon any case presented to him for his decision, but I am merely pointing out the proposition that when it is said that the dominant controlling partisans of the State of Virginia have endeavored to make it easy in that State for the body of its citizenship to find the way to the polls, I turn around and point to the provisions of the constitution, and their enactments of law, and I insist that they have endeavored to make it as easy as possible for the dominant and controlling faction, and as difficult and impossible as the ingenuity of man could devise, so far as the other people of the State are concerned.

Now, I do not care to go into the question of what the existing provisions are as to the right of franchise. Under this provision as to the power of the registrar, in every county in the State they were enabled to place upon the permanent rolls, to remain there unchallenged forever, practically the dominant political population of the State of Virginia, and what they have done since in reference to changing, or what is necessary now to be done, to get upon those rolls, is a matter of the utmost unimportance.

Now I come to this proposition, which is in the case. You are confronted here with proof that tends to show that certain ballots were illegally cast and went into the ballot boxes and were counted. It is impossible for me in the scope of my argument to attempt to point out or refer you to a single instance, so far as the testimony is concerned, where it is shown that an illegal ballot went into a ballot box or was counted one way or the other. That, although it is very burdensome upon the membership of this committee, must be wrought out by your own persistent examination of the testimony, aided, so

far as we have been able to aid you, by the analysis of votes of the individual cases prepared by either side and presented to you; but I take up the question, Has an illegal vote gone into the ballot box? Has just one gone into a ballot box?

What is the effect of it, and what is to be done with it? Judge Saunders admits that a vote cast by any man at the polls, whether he was on the registration book or on the tax-paid list or not, if in fact he was disqualified as an elector of the State, is an illegal ballot in the box and ought not to have been cast, and that you can establish the fact of the disqualification of that voter by other proof than the mere fact of the registration list and the fact that he has voted. Now, if you find a single ballot in the box where the proof is definite that it was cast by a man not qualified under the constitution or laws of the State of Virginia to cast it, you must do something with it. Courts have not permitted that illegal ballots when discovered should determine the result of any election. The courts have held that when you find that one illegal ballot went into the box—most of the courts have held—that you have a right in a court to take testimony to show, if you can, how that man voted; and if you can fairly determine that he voted in a particular way, that one ballot must be eliminated from the column of that side.

Now, what proof is necessary to show this I will not take up the time to argue here, although I think I could state it very clearly; but I believe that the members of this committee—who are not only, I think, all practicing members of the bar, but, as is shown by the very fact that they are here, must be very familiar with the consideration of problems involved in the elections carried on in the country—can determine, and this committee must determine, what character of proof and how much proof is necessary, besides the fact of finding the ballot in the box, as to how and for whom that particular ballot was cast; and, as I said, if from the proof you find it was cast for any particular side, you must eliminate it from that side.

But if you can not find from the evidence as to how that vote was cast or for whom it has been counted, the law still will not tolerate that that ballot shall have any force in determining the result of that election, and therefore the courts have determined and decided, and I think by an unbroken line of authorities, that where illegal ballots are cast, and where it can not be determined satisfactorily as to how or for whom they were cast, those ballots must be rejected at each polling place pro rata from the votes cast for the two opposing candidates at those places. So that if at a polling place three illegal votes were cast, and the vote at that polling place was in the proportion of two to one for Smith as against Jones, you must deduct two of those votes from Smith and the other one from Jones.

Mr. KORBLY. Must you go into fractions to carry that out?

Mr. THURSTON. The courts have done it. In the State of Nebraska they carried that out by a decision of our supreme court at one time, as nearly as I can now recollect it, that an election for one of our judges was carried by $1\frac{7}{16}$ votes, and by the application of the very rule which I have just mentioned.

Mr. KORBLY. Let me ask you a question. Let us suppose they could decide it on the one vote; but suppose that the majority had been seven-sixteenths of one vote, would you say then that that

would have been a declaration of the majority? I mean if the difference between the two was only seven-sixteenths—that is, the total was only seven-sixteenths, or a fraction of one vote—would that constitute a majority?

Mr. THURSTON. On the whole case?

Mr. KORBLY. Yes; suppose that in the Saunders-Parsons case the committee should determine that the difference was seven-sixteenths of a vote between them, could you say that there had been an election?

Mr. THURSTON. You suggest a very interesting question, and I am not prepared to answer it. I am not prepared to say whether a fractional part of one vote can elect any man to office, although in our State we had one instance where the Senator-elect in our state legislature reported that he was elected by a unanimous majority, and it was found that he was elected by one vote. Now, those are the things that the committee must do if they find that illegal votes have been cast. Then the fact that a man was on the registration list is not conclusive proof that he was entitled to vote. The fact that he was on the tax-paid list is not conclusive proof that he was entitled to vote. He may have been disqualified, as a matter of fact, for three or four causes, and there are instances in the vast detail of this testimony of cases of each particular kind.

Notwithstanding the tax-paid list, pro or con, he may not have paid his taxes for three years and the proof may so establish the fact. In that case he would be an illegal voter. He may not have lived in the State two years at the time of the election. In that case he would be an illegal voter. He may not have lived in his precinct a sufficient length of time to entitle him to vote, and in that case he would be an illegal voter. He may have removed from the precinct where he formerly voted and where he now casts his ballot, and in that case he would be an illegal voter. All the votes cast in those cases must be rejected, by the application of one or the other of the rules I have suggested, by this committee.

Of course the great number of votes claimed to be illegally cast in this case are in alleged cases where the voters had not paid their poll taxes under the provisions of the constitution, and it is to the question, first, how shall the proof be taken to show that men who actually voted had or had not paid their poll tax, and had or had not complied with the provisions of the Virginia constitution. I am not intending to discuss just at this moment the question as to whether or not the poll-tax list is conclusive proof at the polls both as to the payment of taxes by the men upon the list and of the nonpayment by others; but I am going to discuss just now, not as a prevoting requisite, but as a question of proper proof in the case, to establish the fact that a man had not qualified himself by paying his taxes, as to what this tax-paid list as a matter of evidence before this committee is.

The law provides, and I want to call attention to it, both for the purpose of this point and of the other one that I shall make further on with regard to this list, that the county treasurer shall make a list. Of what? Not of persons who have paid their poll taxes as required by the constitution, but of all persons who have paid their poll taxes. That is the language of the statute. That is the direction to the county treasurer. It is mandatory upon him that he shall make a list of all the persons who have paid their taxes, and that list, by the law, is made evidence of all it contains. If it were not expressly provided by law

that this should be evidence at all, it is still evidence as a public record required to be kept under the laws and in which the treasurer of the county is under a mandate to place upon that list the names of all persons who have paid their taxes in accordance with the constitution of the State of Virginia.

Therefore, if there were no statute making it conclusive evidence or evidence at all, yet when you come to attempt to prove that a man has not paid his tax, the first evidence, the best evidence, is the record prepared by the direction of the constitution of the State of Virginia. You would say, "Why not go to the treasurer. His records would be the best evidence. Go to the books of the treasurer." Why would they be the best evidence? The law requires him to keep books, showing upon those books the men who have paid taxes; but the law expressly requires him to make a further public record in a list which he is compelled to certify to, which contains the names of all persons who have paid their taxes. Then, leaving out the effect of that tax list at the polls, when you come to attempt to prove the fact that a man has not paid his taxes, is it not the first, is it not the best, is it not prima facie, evidence that a man whose name is not upon that tax list has not paid his taxes?

The rule was invoked here yesterday with respect to this same tax list, and in respect to the action of the judges of elections, that the law presumes that every public officer has done his duty as required by the law, and that until there is proof to the contrary, it must be held that whatever action has been taken officially by a public officer has been a full compliance with the laws under which he acts, and must be so held until there is testimony to the contrary. Therefore this list which the law requires him to make, of all the persons who have paid their taxes, must be, in a court, the official, prima facie test evidence that a man whose name is not thereon has not paid his taxes; and the burden of proof is shifted from the person asserting that the voter has not paid his tax, the burden is shifted then to the other side, to establish that that official list made under the direction and mandatory provision of the law, is not in fact a full and exact compliance with the law by the treasurer.

That is very important in this case, because pursuing that line of inquiry and believing that that official tax list thus required to be kept and certified, and to contain the names of all those who have paid their taxes was the best, was the official, and must be prima facie evidence of the fact that it does contain all the names of all the men who have paid their taxes, we have introduced those lists in evidence as proof, as prima facie proof, as all the proof we are required to present until some one attacks the prima facie proof thus presented, of the fact that men not upon those lists made up and certified to by the officers of their county—the county treasurers—those lists which must be full and complete if the law is complied with, have not paid their taxes; and that is a prima facie case, and with that tax list here and the poll book here, and the poll book showing that John Smith voted at a certain precinct, and the tax list of that precinct showing that his name is not upon it, there is a prima facie case which can not be questioned except by proof that the man in fact actually had paid his taxes; and the burden of proof is shifted.

And so I say, without any fear of being overruled by this committee, that under the provision of this law which makes this tax list a public

record, the preparation and certification of it is an official act under a requirement that this sworn officer place therein the names of all persons who had paid their taxes; that that list, regardless of what it is at the polls, is proof, and in court is prima facie evidence for anybody who may seek to invoke such testimony, that a man not upon that tax list was not a tax-paid voter at the time of that certification to that list; and the burden of proof shifts, and the other side must prove to the contrary. Now, it is very important in this case, because in my judgment, after running down all the testimony as carefully as I could, and with the assistance of my associates in that matter, I have reached the conclusion in my own mind that there were cast, and will be found to have been cast and counted, far more than enough ballots by persons who did not appear upon the tax lists at their respective polls, to more than wipe out, and a great deal more than wipe out the certified majority in favor of Mr. Saunders, and that number is sufficient, if they are excluded from consideration and count, by either of the processes I have suggested, to show that Mr. Parsons did in fact receive a clear majority of the legal votes cast in that district.

Now having stated my position on this, I am not going to extend my remarks along that line any further, but I come to the next question, which goes to this same matter of how certain votes before the committee shall be counted.

There were not enough votes, as you have discovered, cast where this man Mathew's name was left on the ballot and the name of one of the real candidates was left there with it, unscratched—there are not enough of those ballots either pro or con—to determine in and of themselves the question as to which candidate received a majority of votes in that district; but there is a considerable balance of those votes which must go to the credit of Mr. Parsons if the committee shall hold that the name of Mathew had no right to be upon the ballot; and in that view of the case the question is important for your decision, because if the apparent majority shown on the official returns for Mr. Saunders is cut down by the allowance to Mr. Parsons of these Mathew-Parsons votes, then of course it is not necessary for us that the committee shall find as many votes illegally cast and to be eliminated from the result—I mean illegally for other reasons than the Mathew-Parsons situation—it is not necessary to find so many of them in our favor, in order to give us a decision upon the question as to who did receive the actual majority of the votes cast.

I confess that a discussion or a presentation of this question of what shall be done in the State of Virginia or anywhere else where the name of an insane man creeps upon the ballot, is new to me. I think it is new to the world. I have not been able to find any case where anything similar to that situation has ever been presented to a court. It must remain a question of first impressions, to be decided by the best application of a legal judgment.

Mr. KORBLY. Let me ask you a question. If Elliott Mathew had been arrested or taken into custody for the purpose of taking him back to the asylum, and he had sued out a writ of habeas corpus, the question of his identity would have been raised, would it not, necessarily?

Mr. THURSTON. Undoubtedly.

Mr. KORBLY. Any notice that was given to the secretary of state would raise the same question of identity, would it not, whether that was the particular Elliott Mathew that was insane?

Mr. THURSTON. I think so; yes. It might not appear to the voters of the county, knowing nothing about the circumstances, even to those who knew an insane Elliott Mathew, that the name on their ballot was the name of that insane person.

Mr. KORBLY. I mean with regard to the action of the secretary of state?

Mr. THURSTON. Yes; I will come down to that. Now, it is perhaps true that under the laws of Virginia—which are most remarkable in that respect, and I think this represents perhaps the only case of apparent thoughtlessness and lack of extreme caution in the preparation of their election laws—it is possible for any man, by a mere request to the secretary of state in writing, witnessed by two persons, to have his name placed upon the official ballot. That is a most unwise provision. I think we will all have to admit that. See what the consequences might be out in your State, Mr. Korbly, or in your district. See what tremendous complications could arise if the opposition or somebody intending to mix up the whole question of the ballot and confuse voters should get a dozen or fifteen or twenty or thirty or forty men to send in notices that they were candidates for Congress, and all they would have to do would be to sign a notice of that kind and get two signatures to it.

Mr. KORBLY. The same thing could be accomplished by a little bit harder process; not much harder.

Mr. THURSTON. Oh, in most of the States there is a requirement that a person must have had a certain proportion of the votes cast at the last election to go on as other than a regular party candidate, or that any person to become an independent candidate must have a petition signed by a certain number of persons or by a certain percentage of the persons who cast ballots at the last election. There are various legislative provisions of that kind in the various States.

Mr. KORBLY. There was one case referred to here of a man in New York who had a petition containing 2,000 names and he got only 1,100 votes at the election.

Mr. THURSTON. He probably got all he deserved going on the ticket in that way. [Laughter.] All I am saying is that I am not criticising this law, and I am not saying that the question whether it is a good or a bad law has anything to do with the decision of this question. I just remarked that, in my judgment, it is a dangerous law ever to have been enacted, and it leaves the opportunity in the hands of every scheming politician to do these things, and by that I do not refer to the scheming politicians of either party. I say it does place in their hands the power to confuse and to disturb and perhaps to change the result of any election by getting a dozen or fifteen or twenty names, perhaps, on the same ticket for Congress. It is probable, and I will admit it, that under this law a notice which went in to the secretary of state, signed by an individual and witnessed by two witnesses, compels the secretary of state to put the name of that man on the official ballot, with a proviso, however, and I insist upon the proviso, and before I state the proviso I will give the reasons why I place the proviso there as a matter of legal construction.

I can not attempt to turn to the law and quote its exact language, but the effect of it is that "any person" may file with the secretary of state his written notice that he is a candidate for Congress; that "any person" may do so. Now, under the laws of Virginia, which have been sufficiently referred to here, a man must have certain qualifications in order to make him a legal voter. He is disqualified by express provision if he is a lunatic. In order to hold any office in that State, and therefore in order to be a lawful candidate for any office in that State, he must be a qualified voter at the time. I think the law here is clear and explicit, and it furnishes another illustration of the proposition that where the law defines and specifies a certain qualification as prerequisite for anything there can be no other qualification except the one specified in the act; and that when you say that every qualified elector shall be eligible to any office in the State, you say, by the natural and inevitable intendment of the act, that no one but a qualified voter shall be a candidate or hold an office. That statutory interpretation runs into another branch of this case.

I will not discuss that now, but I lay down here for the thought of the committee from this time on that wherever the legislature provides that a certain thing shall constitute a qualification for office, that wherever they provide that a certain official thing shall be evidence of what it contains, wherever they provide that a certain thing may be done in a certain way, it is as much the legislative intent and must be read into the act as if it had been written in the act itself; that the legislature by that enactment expressly prohibited the doing, or the proof, or the prerequisite, in any other way than that defined by the statute. So a candidate for office must have been a qualified elector.

Now, I insist that where the statute of Virginia says that any person may notify the secretary of state and be placed upon that list as a candidate for an office at a state election, that word "person" as there used in the law means a person qualified to run for that particular office, and it can mean nothing else. It does not mean a woman, it does not mean a minor, it does not mean an alien, it does not mean a man disqualified, it does not mean a convict, and it does not mean a man disqualified in any way for holding office in the State of Virginia. It goes without saying that a man who is disqualified for an office can not be in a legal way a candidate for that office. It says "any person" may apply, and it means—and it can not mean anything else—a person who has the qualifications of a candidate for that office or the qualifications to hold that office if the people shall elect him thereto. That term "person" can not mean anything else.

Now, what I say right there is this, and it is pertinent and proper, that when the law requires the secretary of state to place a name which is sent to him in a notice of that character upon the ticket as a candidate, there is a proviso attached, in intendment of law, that he must be satisfied before he places that name upon the list that the man who sends that notice in to him is qualified to be a candidate for that position or to hold that office if he shall be elected to it. No one will contend here for a moment but that the secretary of state, if a notice of that kind went in there signed by a woman, would have the right to refuse to place her name upon the ticket. And why? Not because of the fact that she is not a person, for a woman is a person, and a citizen also. If the term "person" does

not mean here a person qualified to hold that office, it means a woman, or it means a child, or it means an alien, or it means a convict, or it means an insane man. You can not draw any other distinction. It means one or the other. If the name of a woman comes in the secretary of state is compelled to refuse to put that name on the list. Why? Because it has come to his official notice that the person who is attempting to place her name upon the ballot is not qualified as a candidate or is not qualified for the office.

Now, if you concede that, you are bound to go a step further. If the fact being apparent on that notice that the person signing it is not qualified to hold the office or to run for it prohibits the secretary of state from placing the name on the official ballot, you must go with me a step further and say that it is incumbent upon the secretary of state to ascertain, before he permits that name to go upon the ballots of his State, that the person whose name he is putting on there is qualified to run for that office and to hold it.

Mr. SAUNDERS. Qualified, in that connection, according to what? the constitution of Virginia, or the Constitution of the United States?

Mr. THURSTON. Qualified according to the constitution of the State of Virginia.

Mr. SAUNDERS. Can a State add disqualifications to those imposed by the Constitution of the United States, in section 2?

Mr. THURSTON. I am taking this position, and I might as well state it now and have it over with, that so far as the question of Congress passing upon a case of the kind suggested is concerned, as to whether or not a man may be eligible to office under the laws of Virginia, this Congress sitting as a court—and I conceive it to be a court in an election case, no more, no less—holding under the Constitution all judicial power necessary for the determination of the case before it, Congress in its judicial capacity, supremely and completely exercising the judicial powers of the Constitution in the particular case, has just the same authority that any court, state or federal, has to pass upon every question and determine every question necessarily or properly arising in that case, whether that question be the true construction of the Constitution of the United States or the true construction of an act of Congress, or whether it be the true construction of the constitution of a State or of a statute of a State. In that particular case, having that all-reaching and exclusive judicial power, it has a judicial right to pass upon every question properly arising in the case, whether it goes to the construction or interpretation of an act, national or State in its character.

Mr. SAUNDERS. I agree to that proposition, Senator. You mean that they have a right to pass upon the question, judicially, according to the rules of law?

Mr. THURSTON. Yes.

Mr. KORBLY. The question I was going to ask was whether the law of Virginia should control, or the Constitution of the United States, in the determination of these questions?

Mr. THURSTON. I do not read in the Constitution of the United States that a State is prohibited from fixing the qualifications of an elector of that State. I do not read in the Constitution of the United States that a State is prohibited from defining the qualification of a man who can be a candidate for office; not the qualification as to whether or not a man can hold a seat in Congress, but to determine

the question as to whether or not he can go upon the ballot in the State as a candidate for that office.

Mr. KORBLY. Governor Montague said the other day, and I believe he was right, that a Representative in the lower House of Congress not only represents the people of his State but the people of all the States. Now, do you contend that the State of Virginia has a right to limit the qualification for a Representative in the lower House of Congress as against the regulations set up by Congress? Is not that a little arbitrary restriction?

Mr. THURSTON. I do not. I do not contend for anything of that kind; but I do contend that as far as the procedure and the manner of conducting the election is concerned, the way in which a name shall get upon the ticket, what is necessary to be done in order to entitle that name to be placed upon the ticket, what is essential in the first instance to the qualification of candidacy, I insist that that is within the power of the State unless Congress, or until Congress sees fit to exercise its constitutional power and takes that matter out of the hands of the State and legislates for itself.

Now, for instance, every man, you will say, has a right to a seat in Congress who possesses those qualifications fixed in the Constitution; and yet in many, and many, and many States there is a provision that no man can go upon the ticket who is not nominated by a political convention of a recognized party in the State, unless he presents, as a prerequisite to the qualification of candidacy, a petition signed, we will say, by a thousand or by 2,000 or 10,000 people. The law excludes him from the ticket as a candidate on that ticket unless he complies with those provisions of the local law. Is that violative of the enactment of Congress as to what qualification a man shall possess when he comes here?

The CHAIRMAN. Had Elliott Mathew been nominated in the fifth judicial district, would not the secretary of state have been compelled to leave him off of the ticket because of his insanity?

Mr. THURSTON. The law of Virginia does not recognize party nominations. That is a question I will not go into at this time. But if it did, then even a party nomination of a man disqualified for candidacy must be respected.

Mr. SAUNDERS. Before you go further, may I ask you a purely legal question?

Mr. THURSTON. Yes, sir.

Mr. SAUNDERS. By the constitutions of some States the judges of the supreme court are ineligible for Congress. For instance, as I showed on yesterday, a justice of the supreme court of the State of Kansas was held ineligible to a seat in Congress. Congress held that he was eligible. Do you think that the State of Kansas could have said to that man, "Well, you are eligible to a seat in Congress, but we are not going to let you run so that you can present your claims to a seat to that body? Is not that getting at a result indirectly instead of directly?

Mr. THURSTON. Yes, there is a wide and clear distinction between the question of eligibility to a seat in Congress and the regulations which may be lawfully prescribed by a State as to the manner in which and the time when a man may get his name upon the official ballot of the State and be voted for.

Mr. KORBLY. The very question that is involved here is the question of his eligibility to a seat in Congress.

Mr. THURSTON. No, no.

Mr. KORBLY. And not getting on the ballot.

Mr. THURSTON. No, I beg your pardon; not from my standpoint. There is no question here involved as to the eligibility to the Congress of the United States. You may have dead men here if you want to.

Mr. KORBLY. There are some here.

Mr. THURSTON. That may be; I would not dare to say that. It has already been admitted, I think, that there have been insane Members. But this question does not, in my judgment, go to the question of the eligibility of a man to a seat in Congress; it goes to the question as to whether or not he has in a legal way been placed upon the ballot, so that he is a candidate on that ballot. You might as well say that the State can not prescribe any method or manner of voting because, unless a member qualified for a seat in Congress complies with those requirements, he can not get voted for. You might just as well say that the State has no power to pass any legislation as to the manner of the conduct of an election, or as to how a man can get his name before the people.

Mr. SAUNDERS. Just one question, if you will pardon me, in that connection. As a matter of fact, suppose that there was no official ballot, and suppose a district, as a matter of fact, elected a man who was ineligible by the laws of that State; they could not keep from allowing him to come up here and take a seat, could they?

Mr. THURSTON. No, sir.

Mr. SAUNDERS. Then, as a matter of fact, we find, whatever the questions you raise may be, that Mathew's name is on those ballots; the voters, as a matter of fact, could vote for him, and some voters did vote for him.

Mr. THURSTON. Your speculative question makes me think a good deal of the little girl that was found crying, and on being urged to tell what was the matter she told her mother that she got to supposing that she was grown up, and then she supposed that she was engaged to be married, and then she supposed that she got married, and then she supposed that she had a baby, and then she supposed that the baby died, and that was what made her cry. But irrespective of supposition, I will answer that. If you have no condition in your election statutes as to how a man may place himself in the attitude of being voted for at your election, people can do as they please, and it will be up to Congress then to pass upon the question whether a man is qualified to sit in this body.

The CHAIRMAN. Senator, I just want to suggest a rather curious situation. Following Judge Saunders's argument for a moment, and assuming him to be, as we all know him to be, absolutely and highly qualified for a position in Congress, might it not be under his argument that if he went and wrote a letter to the Secretary of State and did not have the two attesting witnesses, yet being unquestionably qualified for a seat in Congress, he might be heard to say that the Secretary of the Commonwealth did him an injustice in leaving him off of the ballot?

Mr. THURSTON. He must comply with the law, and the whole question is whether the State has the right to prescribe these laws which regulate the manner of holding an election.

The CHAIRMAN. You do not take the position that if the people in the district had elected Elliott Mathew by a clear majority, and since that time he had gone before a proper court of the State of Virginia and had been restored to his sanity and adjudged sane by the court there, and he was here now asking for a seat, we would have a right to seat him, do you?

Mr. THURSTON. No; I will go a step further. I do not care whether his sanity had been restored judicially or actually.

The CHAIRMAN. We could seat him?

Mr. THURSTON. You could seat him; but he had no right to go on that ballot unless he complied with the law. That is the point. Now, going back to that a moment, I insist that the word "person" means a person who is under the laws of Virginia capable of being a candidate for office, and that if the notice had been signed by a woman, the secretary of state would not have been authorized to put her name on that list, although she is a person but not an elector and not qualified to be a candidate for office; that if that notice had come to him with the name of a man whom he knew to be an alien just landed in the United States, he would not have been authorized to have placed that name upon the official ballot, and for the same reason; that if that notice had come to him from a person whom he knew to be an infant, not yet 21 years of age, he would have had no right to place the name of that person upon the ballot. If that be true, then there was a duty under this law imposed upon him to first determine as to whether or not the person sending in this notice was a person such as was intended under the statutes of Virginia, might send in that notice.

Mr. KORBLY. A man might not be an infant, and still not be eligible to a seat in Congress under any possible rules of construction.

Mr. THURSTON. I understand that; but so far as my contention is concerned, I am eliminating the discussion of this question of eligibility to a *seat;* I am discussing the question of whether or not that name had a right to go on the ballot, not the question of whether the people had a right to vote for him. I do not have to go to the point to see what the effect is of any name placed by an elector on that ballot at the polls, whether that is the name of an insane person, or a woman, or anybody else. I am presenting the question whether his name had a right to be on that official ballot, and that is the only question. My position is that the secretary of state under that law must ascertain—and it is an easy thing for him to ascertain—whether the person so notifying him is qualified to be a candidate for office, and if that information comes to him upon the face of that notice, or if it comes to him of his own knowledge, or if it comes to him from seeking, or if it comes to him from suggestion from outside parties, it must be true that where he has the knowledge in time to have that name eliminated or not on the ballot at the election morning, it is his duty to see to it that that name does not go to the polling places, and thereby confuse the electors of the State in that manner.

So I say that he had no right to place this name upon the ballot. So I say further, and I only refer to it just for a moment, because time is running against me; this notice sent in by Elliott Mathew was no notice at all. It was the act of a man incapacitated at law to serve a notice of that kind, to execute a notice of that kind, to give a notice of that kind. In law it was the act of a person dead at law, so far as his execution of any instrument of a legal character was concerned.

Mr. SAUNDERS. Will you let me ask you one question, and then I will not ask any more, because you have been most courteous. I know you would freely allow interruption if you had the time. What I want to ask is this: As a matter of fact, Mathew's name was on the ballot. Now, it has been conceded here that a voter could vote for Elliott Mathew either by writing his name on the ballot, after scratching out all names, or by scratching out the other two and leaving his name there. It is admitted that a voter who did this voted for Mathew.

Mr. THURSTON. I do not say I admit it; I only say that I am not prepared to argue the contrary.

Mr. SAUNDERS. Now, conceding that, here is a voter who is a free agent; he finds on the ballot names which, so far as he knows, are those of sane persons, and he marks out one of them and leaves the other two. What is the effect of that upon that ballot?

Mr. NELSON. That is the question that I put to Judge Saunders. Conceding now that he did not get on there regularly, yet in counting those votes we have got to determine the intent. How are we to determine whether or not the same intent was in the mind of the man that left two names, one that of a sane man and one of an insane man, in comparison with the case where the voter deliberately scratched the two names in order to vote for the insane man? How are we to distinguish by any rule the matter of intent in that case?

Mr. THURSTON. That question must come down to two suggestions. The first one which we made and which I now make here and was about to follow up is that his name had no right on that ballot, for the two reasons I have stated, that being the attempted execution of a notice by a person insane and practically dead at law, it was null and void in the beginning; that its being printed on that ballot had no more effect than if the secretary of state, without notice from anybody, had printed the name of John Jones on that list, in which case I suggest—I do not know that my legal acumen is infallible—that if the secretary of state places a name on that ballot unauthorized in any way to be there, that name having no right to be there must be treated as if it were not there, and let the question of intent follow an examination of each ballot in consideration of the proposition that that name must be treated as a blank space on that ballot.

Mr. SAUNDERS. Senator, in the State of Virginia we had a case in which we had to carry the name of a dead man on the ballot. That name had to be scratched out when the voter came to vote.

Mr. THURSTON. I presumed you carried the names of a good many dead ones on the ballot.

Mr. SAUNDERS. He was a dead man at the time the voter voted and we had to furnish for use in the State of Virginia 1,500 rubber stamps to be used to strike out that man's name, and insert another.

Mr. CARRICO. His name had been printed on the ballot already.

Mr. SAUNDERS. His name was there at the time that the voter voted. He had to strike out his name in order to make his vote legal.

Mr. THURSTON. Now, if this name had no right to be on that ballot, and if you can not treat it as a nullity for either of the two reasons I have suggested, then there are other methods of ascertaining the intent of the voter in respect to those ballots where the names of one real candidate and of Mathew were left unscratched, and to those

two methods of ascertaining the intent of the voter I commend the committee.

It is shown in this testimony that all through that district in an exciting campaign of public discussion and of great newspaper vigor, the only two names which had been publicly announced or brought to the attention of the people were those of Saunders and Parsons, the two candidates of the respective parties. It is in the proof that at the hustings and in the press the only voice of announcement that was ever heard that reached the ears of the people was the announcement that Parsons was the Republican candidate and Saunders the Democratic candidate. In determining the intention of a voter you must find out first what information he had upon which he was acting when he came to mark his ballot, and with that purpose in view you must find as a matter of fact from the testimony that the voters when they went into the election booths, not knowing in advance that the name of Mathew would be found upon that ticket, went in there with the belief and the understanding that they were to scratch names as between the two candidates whom they knew to be the only candidates upon the ticket, or running before the people.

Not only that, but I go a little further, and I say in view of the fact that so far as the popular knowledge was concerned there were but two candidates for Congress, those of the opposite political parties, and that for an elector to have erased one of those names is a clear expression, first, of his intention not to vote for that man; and you will naturally agree with me, if he does not erase anything else but that name, whom he thereby declares he does not vote for, and also in view of the public understanding of the question and of his own understanding, that it was his intention to vote for one of the real candidates whose name appeared upon that ballot.

Mr. NELSON. That would be plain if there had not been the fact that there were fifteen votes for the insane man; and that is the difficulty with me, Senator, and I would like to have you eliminate that troublesome thing, if you can.

Mr. SAUNDERS. Before you get to that, there were three presidential tickets on the ballot that were not as well known in the district as Mathew, and did not get as many votes. There were a great many of these ballots that were not scratched at all, as to the presidential part of them. Would you take those presidential ballots, where merely Bryan had been scratched out, and vote them for Taft, although the voter had not erased the other names?

Mr. THURSTON. I would not, for the reason that many of those names were properly and legally on the ballot.

Mr. SAUNDERS. But that is not the point.

Mr. THURSTON. Oh, yes, it is. I say that what I am arguing now does not apply if Mathew's name *was* legally and properly on the ballot. If it was *not* legally and properly on the ballot, then I am discussing what rule should be applied to ascertain the intent of the voter upon the ballot that you have before you. Now, I am stating a general rule; there may be exceptions, and as against the general rule testimony can be considered to the effect that the voter did know Mathew's name was on the ballot and marked his ballot with that understanding. For instance, you might, in the case of any particular ballot, if it were known who cast it, or you might, I think, call up

from the body of the citizenship, if you knew some one who had voted at a particular polling place in this way, and you could prove if it were the fact, and I think you could go into the whole question of public knowledge, if you wanted to go to that extent and pay the price for it, to show that individual voters, or that voters generally, or that a number of the voters, or that voters in some precincts and not in others, knew before they went to the election or went into the booth that Mathew's name was to be one of the names that they were to consider when they got inside.

Mr. NELSON. Is there testimony to show what the intention was, outside of the ballots?

Mr. CARRICO. In some instances.

Mr. THURSTON. Practically none. My contention is that on a ballot which simply discloses the elimination of one of the candidates, under the circumstances I have outlined, the intention must be prima facie an intention to have voted for the other. Where there is, however, on the ballot any other mark, such as scratching out the names of both candidates and leaving Mathew's name, where there is any mark that indicates on the ballot itself that the elector did not intend by simply scratching out the name of one of the real candidates to vote for the other, of course that proof must be accepted and is conclusive of the intent.

I want to say now only a word or two further in connection with this matter. The knowledge of the disqualification of this candidate did come to the secretary of state of the dominant political party in time to have had this name taken from the ballot.

They say he could not have done it, and they ask to be pointed to some provision of law by which he could have withdrawn that name from the ballot as sent out. There is no specific provision of law, for the law had never contemplated that a case might arise where the secretary of state, without making an inquiry, without ascertaining the truth as to the underlying facts, would place the name of a woman, of an alien, or an infant, or a convict, or an insane man on the official ballot. And if, prior to sending out a name of that character, he had not investigated and ascertained that the person sending in the notice was such a person as the law intends that he should be—that is, a qualified elector, then if he should ascertain it afterwards it is in his power at all times up to the morning of the election to undo the illegal work which he has inadvertently or otherwise done.

Now then, going back a little to the question of the intent of the voter, and of how the placing of that name on that ballot was prejudicial to the interests of Mr. Parsons. That notice was written by a man in a store in the presence of two members of Mr. Saunders's party. One of the witnesses to it became a witness to it without knowing Mathew at all, under these circumstances. Mathew asked a young man there at the store to be a witness to that, and he declined, but said "Here is a man who will be a witness to it." This man witnessed it, but finding out what it was, he stated "I will sign this, all right, as a witness, but I intend to vote for Judge Saunders." It came from Democratic surroundings; and I am not speaking offensively now. Great Lord, out in my State I used to have as many real good Democratic supporters, I think, as Republican.

Mr. SAUNDERS. Well, there are a number of Republicans who support me.

Mr. THURSTON. This originated from a Democratic source. The man who signed it was a Democrat; it was sent by Democrats to Democratic officials. It never became public to the Republican electors. Take the testimony in all its length and breadth, there is the mere suggestion of an incident, as you might call it, where it had been stated in some paper or somewhere in one locality that he was a candidate for office, the general fact that he was a candidate for office had never come to the attention of anybody in the Republican party in the Fifth Congressional District until the morning of the election.

Mr. SAUNDERS. No; it was sent out as a news item from Richmond, by a newspaper reporter there, to a metropolitan journal in Lynchburg which came out two weeks before the election, and went all over the district.

Mr. THURSTON. I am not going into an analysis of the testimony on that point. My time is too short. But I say, and the proof will show, that for all intents and purposes the Republicans of that district never had any knowledge or thought that there were to be any names on that ticket except the names of Parsons and Saunders. The Democrats, however, did know it. It had a Democratic origin. It went into the hands for action of a Democratic official. It was sent out to Democratic committees; it was put into the hands of Democratic printers under a requirement of the law that the contents of those official ballots should be kept secret by the printers. The secretary of state knew it. The men who signed it as witnesses knew it. The county committees knew it. The local printers knew it. And there the information in every precinct in that county was in the possession of Democratic men before the ballots were printed and before the day of election.

I am not charging that they did anything wrong about that. That is not my purpose at this time, although I do suggest that the whole manner and method of getting that name upon the ticket bears the earmarks of a scheme originated by somebody whereby to give an undue and unfair advantage to the candidate on that ticket, who was not Mr. Parsons. But they knew it, and if the secrecy of the law was preserved, as I presume it was as far as its reaching any Republican people was concerned, the Republicans of that district had no idea until each individual went into the polling place that that name was upon the ticket, and it is in view of all this testimony that you must determine, if you fairly can, what was the intention of the voter in thus marking the ticket.

And now, just for a little while, and only for a little while, I will discuss the two constitutional questions arising in this case. I am at some loss as to the order in which I shall present my views on these two constitutional questions, but I have thought, on the whole, I would present to you first the question as to whether or not the act of the legislature of Virginia taking Floyd County from the fifth district and placing it in the sixth district was in violation of the constitution of the State of Virginia, as well as in violation of the act of Congress relating to apportionment of Representatives among the States. I will follow this by the question as to whether or not the constitutional power of making an apportionment after each census is exhausted by one act of general apportionment. As I have already stated, the judicial power of the Congress of the United

States to pass upon this question is unlimited and undoubted, and in the absence of a decision placing a construction upon that provision of the constitution by the supreme court of Virginia, Congress is free to express its own deliberate legal judgment as to the proper construction and interpretation and application of the provisions of the Virginia constitution, just exactly as a federal judge would have unlimited judicial power, if, acquiring jurisdiction of a case by reason of diverse citizenship, there should arise in that case, and necessary to the determination of the respective legal rights of the parties, a question of the construction of the constitution of a State.

That federal judge in that case having jurisdiction of the subject-matter and of the parties would not only have the right, but it would be his duty, to place a judicial construction upon the constitutional requirements of a particular State where that constitutional provision was involved in determining the rights of the parties. So there is no question about your power, there is no question about your propriety of action. You must decide this case as the first court that has had presented to it the question of the construction and application of the constitution of Virginia to this case. If the final tribunal of Virginia had construed that section of the constitution, Congress then would have been in the same position as every court of this country is in; it would undoubtedly in all ordinary cases follow the construction placed upon the local constitution or a law of peculiar local application, by the supreme court of the State.

It would follow it not because the decision of that supreme court is absolutely binding in that respect upon this tribunal or upon any other court, state or federal, in any other jurisdiction where the construction of that constitutional provision is called into question; it would follow it not because it is binding, but because it is always assumed, in the first instance, that the decision of the highest tribunal of the State construing its own acts is correct. But cases may arise, and the power exists, where the court may not be willing to follow, may not believe it is right to follow the decision of the supreme court of the State—and there have been such cases—and in such cases courts will refuse, and have refused, to follow the local construction and interpretation of a constitution or the statute of a State. But that is neither here nor there. It is for you now, as a supreme tribunal of justice, having full judicial power, to decide this as a new question, and to place for the first time upon the constitution of the State of Virginia a judicial construction and interpretation.

Just for a moment I wish to refer to the oft discussed and mooted question as to whether or not Members of Congress are, in that sense of the term, state representatives or representatives from the people of their districts. That discussion in the past raged and was waged on many important political battlefields. It was never decided. Nobody knows what may possibly be the ultimate determination of that question. And yet I think that it has become to-day the really settled judgment of this country that the Members of Congress, as contradistinguished from the Senators, provided for under the Constitution are representatives of the people of their districts and that the Senators are the representatives of the States. This would be equally true whether the State is divided into congressional districts or not, because if in the absence of the districting of the State they are elected by all of the people of the State at large, still that

is the district of all of them, contradistinguished from a State as a State; it is the district, and they combined are the representatives of the people of that district and not the representatives of the State.

Now, the Constitution provided that the manner, time, and place of choosing Representatives shall be fixed by the legislatures of the respective States—I may not use the exact language, but that is the idea—and that that power should remain with the States until Congress sees fit to act in that respect. I have always believed, and I still believe, that the power under the Constitution is in the State and in the makers of its constitution, and in its legislative bodies, to take charge of the entire manner of conducting the election, to establish the necessary regulations for its conduct, and, in fact, to do everything requisite that must be done in order to secure the desired results, and that power remains with the State until Congress otherwise acts. But all the time this same measure of power, no less, no more, though dormant, remains with the Congress of the United States and may be exercised at any time by congressional action, which then becomes controlling and is supreme.

Mr. KORBLY. Can that power be exercised by one-half?

Mr. THURSTON. I am not going into that, but I say by Congress it may be exercised, in toto, or pro tanto, or wholly. Now Congress has undertaken to exercise a part of that power with respect to the manner in which congressional districts shall be made. Up to 1842 there was no act of Congress by which it was ever attempted to interfere with the States in the manner of the creation of congressional districts, or as to whether they should have congressional districts or not, and up to that time the power, being entirely in the State, of course their Representatives, elected in any way the state statutes provided, were seated and must have been seated in the Congress of the United States. At that time Congress made its first move toward taking away from the State some little measure or part of that exclusive power to regulate the manner of conducting elections; and when I say that it took away some part of that power I say it because Congress could not take to itself by legislative enactment the application or use of a part of that power without taking that part of the power away from the State.

Congress did take to itself in 1842 sufficient of that power to provide that Representatives should be elected in the respective States by and from congressional districts, to be composed of contiguous territory. That is as far as the act went at that time. Similar acts were passed under different censuses for a considerable time, and then certain other census acts omitted that provision and there were periods when there was no law on that question. Then in 1901 Congress enacted that the Representatives should be chosen from districts, to be established by the State, of course, but with certain limitations as to the manner of their establishment and of the character of the districts themselves. Congress provided that those districts should be composed—we will interpolate into the law "as far as practicable"—of contiguous territory and compact territory, and that they should contain—we will say again "as far as practicable"—a proportionate distribution of the population.

Mr. KORBLY. Now, may I ask you a question?

Mr. THURSTON. Certainly.

Mr. KORBLY. Any interpretation of that act as made by Congress itself would have considerable weight with this committee.

Mr. THURSTON. Undoubtedly, and I will refer to that on another phase of the question. That act meant something. That act meant the assertion of some measure of power on the part of Congress to control the character of districts from which its Members should be selected. Now, to say that after that enactment of Congress the whole power, the extreme power, the unassailable power, of establishing those districts, willy-nilly, regardless of population, regardless of contiguity, regardless of compactness, was in the legislature of Virginia exclusively, supreme, unassailable, is to say that this act of Congress was without any vital force or effect whatever. As to just how far that act withdrew from the supreme control of the legislature of the State its power in respect to the establishment of congressional districts we will consider a little later; but Congress did by that enactment withdraw from the States some part at least of the supreme power it had formerly placed in them to define their congressional districts according to their own wishes.

Now, for the purposes of convenience and time, I am going to argue the application of the law of Congress and the constitution of Virginia to this question at the same time. They may apply in a little different way, but for the purposes of this argument, and knowing that you gentlemen do not need to be pounded and pounded to death on a legal proposition, I am going to do that. I only want to give you enough of a glimpse of it so that you may follow the light thus acquired, and I shall combine the two.

I come, then, to this proposition, that somewhere the power exists to determine whether or not this enactment of Congress and that provision of the state constitution of Virginia have been violated. The power exists somewhere. Where does it exist? That power is in this supreme judicial tribunal created for the purpose of trying this very kind of a case. It must be here. If you tell me that Congress having enacted that statute has no power through any judicial tribunal in this country to enforce it; if you tell me that, you might just as well tell me that it has no power to enforce any other of its enactments.

The power does exist and it exists in you. Whether you will exercise that power or not is in your wise judicial discretion. How far you will exercise that power is in your judicial discretion. In each particular case presented to you the question as to whether or not that section of the law of Congress has been so far violated that you as a judicial body will step in, is for you to determine. In making this proposition I am doing no more than all the courts of this country have done, and I insist that you will find in all these election cases it has been so decided; and there is no possible difference in any of them on the one vital question of the power of the courts to set aside even a constitutional provision, say nothing of a statuatory enactment, if it is in disregard, clear disregard, of a supreme law of the land.

All of them say so. It is not a question of power; there is not a court in the United States that denies to the judiciary the right to determine that an apportionment in a State is unconstitutional and void if the facts in that particular case show that there has been a

refusal, a brutal and violent and inexcusable refusal, to comply with the provisions of the constitution of the State or the act of Congress. I grant you the courts will interfere with great hesitation in every case where it is sought to compel them to decide that a constitutional provision has been violated, and especially in a great matter like this of apportioning the members of the legislatures in the respective States and of Congress in the United States; but in every one of these cases the courts say that the power exists in the court, and the question not of law but of fact in every case presented that the court must pass upon is, has the failure of the legislature been so gross and so willful, or has its action been of a character to set at defiance and to utterly disregard and annul the constitutional provision? If it is, then the law as read by Judge Saunders here to you, gives Congress the power which it should exercise and which it has in fact at times exercised.

Mr. BENNET. Would it interrupt you if I ask you a question on that line?

Mr. THURSTON. Not at all.

Mr. BENNET. Assuming that we find the legislature of Virginia had the constitutional right to pass the second constitutional act, and then we find that the act was unconstitutional under the fifty-second section of the constitution, there comes a further question, that is, what were the rights and obligations of citizens of Virginia in relation to the districts? Did the act of the legislature, assuming it to be unconstitutional, nevertheless create a de facto district which the citizen was bound to respect?

Mr. THURSTON. I am coming to that a little later on, but I will say now that the courts have held that an unconstitutional apportionment is in fact no apportionment. In other words, a district described and defined by an unconstitutional act, is no district either in law or in fact.

Mr. THURSTON. Not discussing yet, as you will see, the other constitutional question as to whether the power once exercised can be exercised again—I have not got to that yet—I come now to the question, was the act of the legislature of Virginia of 1908 in accordance with, or was it a clear, express, brutal, unwarranted, unexplainable violation of, the constitution of the State of Virginia? Let us see what that constitution provides.

Mr. BENNET. I have that here, Senator, and I will read it if you would like me to.

Mr. THURSTON. Very well.

Mr. BENNET (reading):

> The general assembly shall by law apportion the State into districts corresponding with the number of Representatives to which it may be entitled in the House of Representatives of the Congress of the United States; which districts shall be composed of contiguous and compact territory containing, as nearly as practicable, an equal number of inhabitants. (Art. 5, sec. 55, Constitution of Virginia.)

Mr. THURSTON. What I want to call the attention of the committee to is the language of that constitutional provision, which says the legislature shall apportion the Representatives to districts created in such and such a manner. It provides for what is thus by constitutional provision, declared to be an apportionment. Now, here is what I say. If what they did in 1908 was not in any sense an apportionment tested by any rule under the most favorable consideration

in favor of the power of the legislature, if it was not an apportionment, then it was not in accordance with the constitutional provision. They had already apportioned the State into representative districts in 1906, two years before. Four years before that the legislature had passed a law similar in character, although extending to all the districts of the State; but in certain respects and as to certain districts similar in character to the inequalities and injustice of the one now before this committee; and the governor of that State at that time had called the attention of the legislature to the fact that such act of theirs, although a general apportionment act, was unconstitutional and in violation of the constitutional provision with respect to the apportionment of Members of Congress, both as to contiguous territory and compactness, and as to population.

That was the decision of the executive of the State, but it was so quickly and readily recognized in and accepted as a true statement of the constitutional construction that that veto was not even called up in a legislature where many more than sufficient members of his own party, who had already voted for the bill, remained in each body to have passed it over his veto.

Mr. KORBLY. Was not that because it was sent in on the last day of the legislature?

Mr. THURSTON. I understand not. I understand that the veto was simply left to lie there without a voice of protest from the legislature which the governor had thus charged with violating the constitutional requirements. And there it remained, a notice to every succeeding legislature of the State that the proper construction of the constitutional provision in Virginia was that there must be a compliance with the Constitution in an apportionment of Representatives into districts in the State—that there must be a fair effort made to comply as to compact and contiguous territory and as to equality of population with the provisions of the Constitution. The State acquiesced in that veto. Two years later a new legislature acquiesced in that veto, and again two years later another legislature acquiesced in the governor's constitutional construction, and passed a general apportionment act, measurably complying with the requirements of compactness, contiguous territory, and equality of population.

These districts were established in 1906. Whether the legislature thereafter had the power or had a continuing power and a remaining power to again apportion Representatives is a question that I will discuss very briefly soon, but not here. But what I insist is that the act which they did pass in 1908 was not an act which can upon any construction of that constitution of Virginia be claimed as an apportionment act. I want you to understand what an apportionment means. Were astronomers called upon to apportion the bodies of our solar system, they would not do so by taking from Venus and adding to Jupiter, or by taking from the moon and adding to the earth. That is not an apportionment. An apportionment, under every definition of it you can find in dictionaries or in judicial decisions or as expressed by prominent men of letters, is a bringing nearer, a bringing nearer to equality. That is the sum and substance of the definition; it is bringing nearer to equality. That is an apportionment, and the rending apart of an apportionment already made is not a new apportionment.

Of course this act of the legislature affected four congressional districts. It took two counties away from two districts and put them into two others. But I will only discuss it as it takes Floyd County away from one district and puts it into another. There is this district on the map. Is the eyesight of man so blind that it can not see, or is it so perverted that it can not see, that the taking of that county from the fifth district as theretofore established did not result in more compactness or greater contiguity of territory? In taking away that portion from a district lesser in population than the one to which the county is transferred, can the mind of man conceive that such act is an apportionment, a bringing nearer to an equality, as between those two congressional districts? Suppose this legislature had excluded by a single act Floyd County from the Fifth Congressional District, and stopped right there, placing it nowhere; would that have been a constitutional exercise of power? No man will say that it could be. Then how is it made constitutional because, after taking it away from that district, it places it in another district?

Mr. SAUNDERS. Senator, if the fifth district is less compact, the sixth district is made more compact. On the whole the latter is made a better district than it was before.

Mr. THURSTON. I am not arguing anything about the sixth district.

Mr. SAUNDERS. Yes; but I am saying that on the whole the principle of compactness is not violated. If one district is made less compact the other is made more so.

Mr. THURSTON. Well, that has not been pointed out, and I do not think if you will look at the map it will follow, at all. But it does not make any difference. The power to apportion or to reapportion does not mean the power to take from an established district and add to another district, unless there can be at least conceived, behind it all, some purpose to more nearly establish an apportionment—that is, an equality—between the districts.

Now, nobody on earth has ever pointed out any possible purpose underlying this act to more equally apportion representatives as between those two districts. Nobody has suggested it, and nobody can do so. You read the answer on the face of the map. You read it in considering the population. It is taking from the less and giving to the greater. You read it in every surrounding fact that can be discovered. You read it in the fact that the governor of the State, six years before, had solemnly notified the members of the legislature that they were violating the constitution when they attempted a similar outrage upon the political rights of the people of the State. They took away from the less and gave to the greater. If that is an apportionment, that individual act of taking away from the less and giving to the greater, I do not understand what an apportionment is.

Now, I could not make so strong an argument upon that particular proposition if this were an act which on the face of it purported to apportion congressional districts throughout the entire State, because when the legislature acts upon a general apportionment it must be conceived, and is at least conceivable and supposable, that underlying the general harmony that must be secured reconciling differences and at last securing an entire apportionment of the whole State into districts, there must be some concessions here and there, and some resulting inequalities. I can conceive that a court would

be very reluctant to say and would hesitate long and properly so before it would ever say, although it has the power to say, that an act of apportionment of the whole State into districts is so disregardful, so outrageously disregardful, of the act of Congress and the constitution of the State that it is null and void.

But here there was a general apportionment in 1906 which the legislature necessarily declared was a fair and just apportionment of the State into congressional districts. Two years later, without any attempt to readjust the districts throughout the State, they passed an act of political rapine, by which they seized from the belly of one district a portion necessary to be taken away in order that the dominant political party in power should have a certainty of sending to the Congress of the United States another Representative.

Talk up and down and say nice things as much as you please, Gabriel himself, if he were to announce any other purpose in that enactment, would not have a listener within the boundaries of even Virginia. Such gerrymandering has been done by Republican States, it has been done by Democratic States, it has been done most outrageously by Populists, but it was never right that it should be done. Every man agrees to that, and it remains, and you know it, established beyond all controversy, that here was a district which, as it then stood, the dominant party in the State of Virginia believed might be lost to them, and the representation of which they could make secure for their party by taking a thousand Republican majority away from it, with utter disregard of the constitutional requirements, and placing it over in another district, where that majority one way or another would not cut any figure.

Now, I say this, that the act is not an act affecting alone the interests of the people or of the political parties of the State of Virginia. That act is an act of outrage committed against every individual in the United States. Every man in my district in the State of Nebraska has a right to demand that every man sent to Congress to pass as well upon his own as upon our interests shall be sent there with a clean bill of health, and that in his election there shall be fair representation, given according to population, to political differences between the parties, and——

Mr. KORBLY. If you will let me make a suggestion, I would like to say that Congress in the apportionment of Oklahoma has violated these very principles in a much more flagrant way than anything you claim in this situation.

Mr. THURSTON. I do not know anything about the Oklahoma situation. Congress could undoubtedly do that. It would not be a constitutional question with Congress; it would be a question of decency—political decency.

But you can not get away from the fact that there was and could have been but one purpose in that so-called apportionment act, which was not an apportionment act at all, and that was to secure a certainty of a continued representation of the dominant party in the Congress of the United States from that district; and the result shows it.

It was suggested here by Mr. Saunders that if he could explain to this committee, there were many reasons why this act was justified, why it was better for the one district or the other that these changes in counties should be made; but if there was any such underlying

or proper or controlling reason, it was his duty and his right to have taken testimony upon that question and presented it here. If there was a localized community of interest existing there, that is a physical fact capable of exact testimony. It should have been proven. If there were any railroad communications so that it would thereby give to the people better service, or to the district as constituted anew better communication, that was capable of proof.

If there were any roadways that would give any better access from one part of the district to another, that was a matter that could have been readily proven. But there is not any proof, and the case stands that, for what must be conceded an absolute political advantage, a district already created by proper apportionment act of the state legislature, it was robbed by taking away from it that particular portion of the district which alone had permitted it to pass muster as being composed of compact and contiguous territory. There is no excuse offered; there can be none. It was a mere political play. It was at the best a brutal exercise of political power, a brutal, inexcusable, unjustifiable exercise of political power. That is the best you can say. It is only defended upon the proposition that they had the power and had the right to exercise it brutally. That is all. There is no excuse for it. It was not in the interest of fairness or justice; it was not carrying into effect the plain intent and purpose of the constitution of Virginia and of the act of Congress of the United States; it was not for the purpose of reapportioning Members of Congress among the districts of Virginia; it was not for the purpose of bringing them more nearly into compliance with the requirements of the constitution as to equality of population and contiguous and compact territory.

It was the exercise of a brutal political power, justified only because it is said there is nothing that can be invoked to prevent it, and you have the result without excuse, and with virtual admission that it violates all the spirit and all the purpose designed to be effected by the constitution of the State of Virginia and by the act of Congress. The only argument is that although it violates the spirit and destroys the purpose, it does not lie in the power of any tribunal, judicial or otherwise, to declare that that exercise is void.

Now, just a few words along the other line, as to whether or not this power once exercised, even if the second act was an apportionment act, can be exercised again during the same census term. I readily understand what difficulties surround us when we ask this committee to make a report here which would apparently and upon its face contradict or be in the nature of a review or reversal of the election case in New Hampshire, the case of Perkins *v.* Morrison. I want to be fair.

That case did present the question of one apportionment made under the act of Congress of 1842 in the State of New Hampshire, followed by another apportionment act which changed a district or districts, and in that case it was held that under the constitution, and until or unless limited by congressional enactment, the whole question of apportionment was in the legislature of the State, and that case did hold, at least by natural and necessary intendment, that that was a continuing power, and it was undoubtedly the view of the committee at that time that it was a continuing power in the legislature of the State, and that one exercise of it by an apportion-

ment did not exhaust the power or limit or prevent a further exercise of it. But what I wish to say on that is this. If you will look into that case, what was reported, and what was said in argument upon it, there was nobody on either side of that question in their report, or on the floor of Congress, unless I am very much mistaken, who was urging, or suggesting even, that the power of apportionment given to the State under the act of Congress was a power to be exercised at a specified time or in a specified manner, and that one action under it exhausted that particular power. That really was not thought of; it was not considered; it was not digested—that idea.

It is true that the decision goes to the extent of saying that, not in exact terms, but by fair construction, because that was a fact, and I do not wish to dodge it. The case undoubtedly decided that; but at that time, as Governor Montague says, the question had never been before any court in this country; there were no judicial decisions to guide the Congress of the United States, and when I say "guide," I do not mean to control. Congress will give to all the decisions of all the courts due credit, and if they seem to be the judgments of deliberate tribunals after full hearing, and well forfeited by opinion, they are very apt to follow them. But I say at that time the question had never been presented before the courts in this country. It had not been suggested, and the necessity for it had not arisen; and in the New Hampshire case you will find, if you look it all the way through, that that particular question as to the exhaustion of the power by the one exercise of it was not in any way clearly or distinctly put in issue or distinctly thought of or considered or argued out.

Since that time, however, the question has arisen in several States of the Union. I can not refer to these cases now in extenso or read from them, but in One hundred and seventy-second Illinois and in the Wisconsin case cited and in the Indiana case cited there at least in those three States has been an express decision of the precise point, as the result of three of the very ablest opinions you can find in the books, well reasoned out and well fortified in every respect, and backed up by analogous authority from many courts. There are those three decisions which decide exactly this: Where there is a provision for the taking of a state census or a national census—in Illinois it was a state census, but in the others a national census—and that after taking that census and that census being established the legislature should divide the State into legislative districts, the creation of those districts by a legislative act exhausts the power. I am not going to discuss these cases on the question of fair apportionment or contiguous territory. I have said enough about that. I will only say that these cases all fortify my position on those points also. But in the three States named the requirement was that after the taking or the establishment of a census there should be an apportionment; that after each census there should be an apportionment; and the constitution in those three States was silent beyond that. There it stopped. It was silent. There was no negative suggestion of any kind or character that they could not make another apportionment. It just simply directed them to make one. Now, the courts in all three of those cases held that there was no continuing power vested in the legislature after it had once exercised it. Those courts further held that by providing the time and place or the time and conditions precedent to the right of the legisla-

ture to apportion, or to the duty of the legislature to apportion, there arose an inhibition against the exercise of that power in any other way or at any other time; and I submit to this body that those three cases are excellently well reasoned. They are not hasty or ill advised. They are fortified by authorities and by the truest application of the proper rule of construction of statutory and constitutional provisions, and they decide that where the power is given or conferred, after the happening of an event like a census, to apportion the State, the power continues until it is exercised, and when exercised it is gone until another period, as fixed by the census, creates a new power or revives a power that has slept.

If these decisions are correct, then, in the light of the judicial decisions of this country to-day, the New Hampshire case was not decided correctly upon that point. It is always well enough to adhere to precedents, but a bad precedent ought not to be followed. A precedent which does not commend itself to the judicial judgment of trained lawyers at this time should not be followed because it appealed to the trained judgment of trained lawyers at that time. Why, we are changing all the time, and necessarily changing, from decade to decade, in our construction of even the great Constitution of the United States, that wonderful instrument on which hangs and rests, in the ultimate, the liberty and rights and property interests of every present and future citizen of this great Republic, the most wonderful document that ever was written. Yet that was written in the twilight and by the candle-light of the afternoon of the eighteenth century, and with respect to the existing conditions and necessities of the country at that time. If it is to remain the bulwark of our rights, if it is to remain an instrument capable of preserving us in our increased power and prestige in our rapidly diversifying interests, in our expanded boundaries, in our wonderful creative and inventive genius, in the vast multiplication of all avenues of business, if it is to do all of this for the men of future generations, then, indeed, it must be construed according to the mightier necessities, and in the electric splendor of the twentieth century civilization.

We are growing, inevitably growing, in our construction even of the Constitution of the United States; for national necessities, for the preservation of our power, for the protection of the people, there are clauses of the Constitution of the United States which the judgment of men before these new conditions had arisen said meant one thing, that must, if we are to live, be declared by men of a new generation, of a new time and new conditions, to mean other things; to mean adequate protection and guarantee of the rights, of the liberties, of the opportunities of the men of the future. The decision rendered in the old New Hampshire case on this particular point does not rest upon any thorough discussion of that particular point; the question of the exhaustion of power was really not then thought of.

Mr. SAUNDERS. In that connection I want to refer you to the Congressional Globe, in which it was discussed.

Mr. THURSTON. I understand just how far it was discussed, and I still stand here to maintain what I have stated.

Mr. SAUNDERS. It is page 184 of this volume of the Globe.

Mr. THURSTON. Yes; I understand. I know how far it was discussed; when I say discussed, I mean argued out. There was no underlying argument there. They do say that it is a continuing

power. That is not a discussion of it. What I said was that the case was not discussed on that question.

Mr. SAUNDERS. Right here is the discussion.

Mr. THURSTON. That is a decision.

Mr. SAUNDERS. No; it is the discussion, Senator.

Mr. THURSTON. But there was not any of what I call real discussion, and there certainly was not any such judicial examination of that constitutional question, and there was no such judicial result or decision arrived at as has been arrived at after the calm and exhaustive consideration of this same question of construction of the Constitution by the courts in these latter days; and what I say is, where an old decision of Congress stands alone, Congress, being a part of the judiciary of the United States, when it comes to try another case, will give heed not only to the decisions of its own tribunal in the past, but will also take account, in announcing its new decision, of what the courts of equal jurisdiction, having under consideration the same questions, have said in other places.

Now, there are only two things that I have omitted, and just for a moment I want to refer to those. Passing hastily over the case and reviewing mentally my argument I find that I forgot to speak of two questions. Going back, therefore, the question arises here as to whether or not the tax-paid lists under the laws of Virginia were the exclusive method of establishing the right of a voter to cast his ballot on election day so far as the qualification of tax paying is concerned.

It has been suggested, and I have heard it stated here as a part of the argument and as argument only, that two judges in the State of Virginia have reached a conclusion which I can not feel is justified under their statutes on any theory of statutory construction. It is also stated here, also on argument, that other judges of the same State at nisi prius have decided exactly the contrary. It, however, remains the fact that the supreme tribunal which has the right to construe the laws of the State of Virginia and to place a meaning upon them that can not be disregarded by any inferior court of that State, has not passed on that question; so that except as the reasoning given by the judges who rendered these nisi prius opinions, as Judge Saunders has stated here, may appeal to the reason and judgment and legal intelligence of this committee; they have no binding or authoritative weight as adjudications. And this tribunal must regard them the same as they would any other opinion of any other judge in any other State or anywhere passing upon a similar question.

They should regard them as the expression of men supposedly learned in the law and holding judicial place, of their views of the proper construction of a certain statute. From my standpoint, I confess I may be blind, but I can see only one possible construction of the statute of the State of Virginia on that question of that poll tax. In the first place, what is its purpose? There is only one answer to that; its purpose is to execute the law so that no man shall vote who has not paid his poll tax. It is in execution of the enforcement of that inhibition against the right of a nontaxpayer to vote; there is no doubt about that. That is what it was passed for. Why do they have a tax list at all? Why is it posted up? Why is notice given? It is simply an attempt of the legislature—a very justifiable and proper attempt—to compel and secure a ballot in which there shall not be found, or in which it is hoped there will not be found, any

ballot cast by a person who is disqualified by not having paid his poll tax. It was a very wise and proper provision of law. It meant something. In the first place, the requirement is, as I have already stated, that the treasurer shall place upon that list the names of all persons who have paid their poll taxes. Having discussed that somewhat at length, I will not go into it further here. He was required to place all the names on that list. Therefore, if he performed his duty there was upon that list the name of every man who had paid his taxes. The presumption of law invoked here on yesterday is that every public officer will do and has done his duty and complied with the law. If that presumption holds in this case, then that tax list represents on its face not only those who have paid, but being a compliance with the statute which requires it to contain the names of all those who have paid, it contains on its face the absolute, unchallenged, uncontradicted proof that nobody has paid his taxes who does not appear on that list.

Mr. HOWELL. Not when it is done on the presumption that every citizen will pay his taxes.

Mr. KORBLY. There is no such presumption.

Mr. HOWELL. The presumption is that every one will do his duty.

Mr. KORBLY. I have never found that.

Mr. HOWELL. Yes, it is.

Mr. KORBLY. I think you are confusing that with the presumption that every person who holds official position is presumed to have performed his duty.

Mr. HOWELL. No; it is only on that presumption that every man is presumed to be innocent until he has been proven guilty.

Mr. THURSTON. As a matter of fact, under any law, in any case of this kind, the unevidenced presumption that a man has paid his poll tax does not constitute any prima facie case that would entitle him to vote.

Mr. SAUNDERS. Just in that connection permit me to say this: I agree with that proposition, that if a man is not on the tax list, then the burden is on him to show that he has paid his taxes; but when he votes, then the presumption is that he has satisfied the judges that he has paid his taxes.

Mr. THURSTON. Yes; I am going to get right down to that. What have the judges got to do with it?

Mr. SAUNDERS. Because the judges of election do not do their duty——

Mr. THURSTON. That is what I am going to argue.

Mr. SAUNDERS (continuing). If they allow a man to vote unless they were satisfied that he has paid his tax.

Mr. THURSTON. That is what I am going to argue. The law provides that that tax list at the polling place shall be the exclusive proof. What is the word? "Conclusive;" the conclusive proof.

Mr. SAUNDERS. Of what it contains.

Mr. THURSTON. Of what it contains. Now, by every rule of statutory construction, when the law provides that that list shall contain the name of every man who has paid his poll tax there is contained therein by intendment, just as if written in letters of fire, that no other man in that election district has paid his poll tax; and it is all there on the face of it.

Mr. KORBLY. Does the statute really contain that, that the absence of a man's name from that list is conclusive evidence that he has not paid his taxes, even although he has paid them?

Mr. THURSTON. It is conclusive proof so far as the action of the judges at that election in receiving his vote is concerned; and I will show you why. It is conclusive proof that every man on there has paid his poll tax; that is, conclusive for the purposes of voting at that election.

Mr. KORBLY. Certainly.

Mr. THURSTON. Now, a man comes up to the judges of election, and he finds the name of his neighbor, John Smith, on the list, and he goes to John Swith and says "You never paid your poll tax," and John Smith says, "I know that." Then he brings him up there and he brings the treasurer there and challenges the vote of John Smith, and he takes testimony before the Judges, and it is shown by the admission of the man and uncontradicted proof that although his name is on that list he has not paid his tax. Now, what are you going to do?

Mr. KORBLY. Under the law of Virginia he is entitled to his vote.

Mr. THURSTON. Certainly he is. They have got to admit his vote. The question of its legality of course will arise afterwards on the contest, as it arises here, but they have got to admit his vote. Therefore that list is binding on those judges, and the law does not confer any power on them to hear any question involved in relation to that list. In the only two cases where the man's name would not appear on this list by reason of his having been too young, or by reason of his having moved in from another county, the legislature has provided, by explicit provision that has been read here, that that man, because he could not have got onto that list, may vote by presenting another proof which the legislature says shall be good, and that is the certificate of the treasurer of the county where the tax has been paid, and where he formerly resided.

Mr. SAUNDERS. Suppose you take the other side of the case. Here is a man not on the list, and he brings his tax receipt, and then in addition to that the treasurer, and proves that he has complied with that section of the constitution and claims the right to vote. Do you claim that that man should be excluded?

Mr. THURSTON. He can not vote. It is the application of the same rule. It is the same justice. A man who is on there, who ought not to be on there because he has not paid, must be permitted to vote. A man not on there, although he has paid, can not be permitted to vote.

Mr. SAUNDERS. In one case it is an absolute constitutional requirement, and in the other case it is a hardship imposed by an arbitrary and unnecessary interpretation of the constitution.

Mr. THURSTON. No; it is not at all.

Mr. SAUNDERS. You can not cite me to any constitutional provision which plainly says that a man must be on the tax list in order to vote.

Mr. KORBLY. It is conclusive of an affirmative proposition, and you argue that it is also conclusive proof of a negative proposition.

Mr. THURSTON. Yes, undoubtedly; and especially in this. The requirement is that it shall contain all the names, and it is perfectly evident that it was the intention of the legislature that this should be the proof, the only proof, both ways at the polls, for the judges of

election; because in the only other two cases that could arise, if the party who could not have been on that roll for other reasons can bring his treasurer's certificate there, they are required to accept that as evidence. But now let us see what is claimed here: It is claimed that notwithstanding these statutes, notwithstanding a man is not on the list, that the judges of every election precinct have a right to sit judicially and hear and determine the case of every man who comes and says, "I am not on the list, but I have paid my tax."

Mr. SAUNDERS. Yes; and our statute gives them the right to hear all challenges of voters.

Mr. THURSTON. But this is not a case of challenge at all.

Mr. SAUNDERS. I do not know why.

Mr. THURSTON. It does not involve a challenge.

Mr. SAUNDERS. It involves the right to vote.

Mr. THURSTON. Yes; but the law has provided how challenges shall be made. It has not provided that the judges of election shall have the right to sit judicially to determine whether a man actually paid his tax or not; nor have these same judges of election been given the right to establish rules of evidence as to how that proof shall be made, whether by hearsay or by the declaration of Tom, Dick, and Harry, or by the certificate of the treasurer, or whether in any other manner. Even in the case of parties who have been prevented, as by living outside the county, or as new voters, from being upon the rolls, the legislature has limited their proof to the certificate of the treasurer. Do you think that the law intended to permit men who could have been on that list and had not exercised the due vigilance to place themselves there, to have their names put there afterwards? Do you think that the law intended that the bars should be thrown down and that they should not be required even to present a treasurer's certificate at the polls as other people are, in order to be entitled to vote?

Why, Mr. Chairman, if that rule of construction is correct, if the law of Virginia confers upon the judges at each polling place—these little, irresponsible election officers who strut for a day and then disappear—if it is intended to confer upon them the judicial power regardless of these election laws, to permit by any proof they are willing to accept, a man to establish the fact that he has actually paid his taxes, it opens the conduct of every election in Virginia to all sorts of fraud and partisan mismanagement, if political parties see fit, as they sometimes do in other States, to take advantage of such situations. In my judgment if you establish the rule that those election judges can let a man vote on the strength of any kind of proof that is satisfactory to them and taken at the polls and not made of record, that can not be challenged anywhere else, that can not be revised or reviewed or appealed from, if you intend to say that the legislature has given those judges that power, I intend to say that the minority party of the State of Virginia will never carry another congressional election in that State. They can not do it. The testimony taken in this case shows how many have voted and how many were permitted to vote who were not on that tax-paid list, and the evidence shows in many cases that those who were permitted to vote, and who satisfied the judges of election on that point, were not, in fact, entitled to vote.

Mr. SAUNDERS. Let me refer you to the law in that connection.

Mr. THURSTON. Yes.

Mr. SAUNDERS. If a man has not paid his taxes, that is a question of fact, is it not, and not one of law? That presents a simple question of fact to the judges. This reads:

> Any elector may, and it shall be the duty of the judges of election to, challenge the vote of any person who may be known or suspected to be not a duly qualified voter.

And then there follows another section which describes how they shall hear the evidence in each case and determine on that question of fact.

Mr. THURSTON. That question does not go at all to the question of the man who is on the list.

Mr. KORBLY. May I ask you a question, Senator?

Mr. THURSTON. Certainly.

Mr. KORBLY. The constitution of Virginia says that a man who has paid his taxes shall be entitled to vote. What have you to say as to the prescribed methods of limiting that right?

Mr. THURSTON. I was about to get to that. The constitution of every State prescribes the qualifications of an elector. In the old States, under all constitutions, the only requirement was that an elector must be 21 years of age and a citizen of the United States, and must have resided so long in the State, and there it stopped. Under all those constitutions, in order to secure purity and fairness in elections, gradually there came to be enacted first registration laws, and then other laws following along the line of securing justness and fairness and purity in election methods. Every one of those laws provided that men, otherwise duly and constitutionally qualified, should do certain things before election day in order to vote, and I know of no cases where any of those provisions of registration or otherwise of that kind or character have been declared as violating the constitution, although in many instances and under particular circumstances they do prevent men from going to the ballot box, to the booth on election day, who are citizens and qualified electors.

Mr. SAUNDERS. You think that great evil will follow from allowing the judges to pass on this simple question of fact. Does it not suggest itself to you that if the principle you contend for, of the power of the legislature to make these requirements, be conceded, the legislative action can destroy the constitutional guarantee by making provisions in conflict with it?

Mr. THURSTON. Oh, that has all been worked out by a harmonious and unanimous line of decisions through the courts, that the legislature has the power. Of course it is subject to a judicial review. If they pass an act which in effect deprives a man of his right of suffrage, it is unconstitutional.

Mr. SAUNDERS. That is exactly what I hold.

Mr. THURSTON. But it is held by all courts that it is within the power of the legislature to prescribe the laws and methods by which every elector can put himself in a position to insist on his right to vote at the polling place.

Mr. CARRICO. Our constitution provides how every man shall go on the list.

Mr. THURSTON. Yes; I understand that. In Virginia there has been no conclusion at all; but I say in States that have no other provisions in the constitution, registration laws have always been upheld; and yet if

the contention made here is correct, no registration law is good, because the contention would be that while the constitution does not require a man to register, yet being a qualified elector under the constitution he has a right to vote, notwithstanding what the legislature may insist he shall do before he exercises the right. The whole question is always, is this requirement placed upon this man for the purpose of securing purity and fairness in elections, a reasonable requirement, that he must comply with before he can insist upon the right to vote. Every man has a right to go into court, but no man can get into court unless he goes there upon a proper statement of his claim. He has got to do certain jurisdictional things to get into court.

Mr. KORBLY. But in every court there are secondary methods of getting at facts by evidence.

Mr. THURSTON. Yes. But a man can not go into court, just walk into court, and say "I am here, and this is my case." He has got to proceed by the orderly methods pointed out. So in the case of every registration law it is provided that men must register before a certain time. They keep the list open until certain days and then it is provided that they shall be closed at a certain time. Many of those first registration acts contained no provision whereby a man could swear his vote in on election day, and yet they were held good. The same suggestion was made in all those cases, and the argument went on and on and on, that a man might be out on the road traveling and out of the State for thirty days before the election, and he would have had no chance to register. The only answer to that is that it is a reasonable requirement that a man shall not be permitted to assert his right to vote unless he has registered. It is not a question of his right to vote, but he shall not be permitted to assert that right to vote at a particular election unless he has complied with the conditions.

Mr. SAUNDERS. Unless he has performed the requirements of the statute, he can not insist upon the right to his vote. The two cases in which those requirements were waived were at least specific and absolute; but now you wish to add something by construction.

Mr. THURSTON. No; not at all.

Mr. SAUNDERS. You want to add to our constitution by construction.

Mr. THURSTON. Oh, no; it is specific by any rule of construction we can invoke. It is specific under the two reasons that I suggested, first, because the law requires that the list shall contain all the names, and, second, it is specific when it makes the list absolute proof of what is contained in it. By intendment, by the same rule that was ever applied to any statute, by the same rule of construction that has been applied in Wisconsin, Indiana, and Illinois on the constitutional questions I have referred to, the opposite inevitably follows, that where the statute has pointed out the direct means of proof, it excludes every other kind of proof; and by the further fact that in the only two cases of persons who could not have by a little exercise of diligence placed themselves on this list, the statute has permitted them and them only, by express terms, to qualify at the polls by the presentation of the certificate of the treasurer; and even as to them it has limited the character of the proof that they can present; one class of people must stand on that tax list, while those who could not have got on it if they had exercised the vigilance and diligence that the law requires, are permitted to present a treasurer's certificate.

In the case of ex-soldiers who need pay no poll tax the law provides that the registration books shall state that fact, and nowhere is any power given the judges of election to decide any of these questions except from official records.

The CHAIRMAN. If there is anything else you want to present, Senator Thurston, I wish you would do it in as short a time as possible. We do not want to call you back, and the committee is anxious to adjourn.

Mr. THURSTON. Yes; I understand. The committee has been very kind to me. I have tried to present the case as briefly as I could, but I have had a good deal to go through, and I have tried to confine myself as much as I could to those questions which I thought important and material.

Mr. Chairman, I think I have at least challenged, and pretty sharply, the attention of the members of this committee to all the laws and all the statutes, and to what I think should be the proper construction to be placed upon them, and as to their application to a case of this kind, and with that I submit the case. I only wish to add, not rhetorically, as my friend did, who at the end of his address made a most magnificent peroration, but in all sincerity, as I know he was sincere, the desire and the belief that this case will be decided as a question of law by a court exercising judicial powers, and that within the sacred precincts of this court, where justice sits, no more than in any other judicial tribunal shall any outside considerations be permitted to enter. We do not ask, we do not expect, any decision other than that based upon the deliberate judgment of this committee as to the law and the facts.

ADDITIONAL STATEMENT OF MR. SAUNDERS.

Mr. SAUNDERS. Mr. Chairman, I am glad I met Senator Thurston. It has been a pleasure for me to conduct this case with him. Before you break up, I want to say a word in respect to an outside matter that was brought in here by Governor Montague, and to which I wished to reply at the time. I wish to submit in this connection a matter of record. It was suggested, and it has been argued before the committee, that with the most ample opportunity to pass the act of 1902 over his veto, the legislature acquiesced in the force of his reasoning. I simply wish to call your attention to the fact that the veto was sent in on the 2d day of April, and on the 2d day of April, according to the acts of the Virginia legislature that I have here, the last acts were signed by Governor Montague. That is, his veto message came in when the legislature was breaking up, and there was no time to take up and consider the message with a view to passing the act over the veto. This required a two-thirds vote, which at that time of the session was hard to secure. The legislature might not have passed the act over the veto, even if the effort had been made, but certainly no adequate time was afforded in which to make the effort. At that period of a legislative session it is frequently hard to get a quorum.

Mr. THURSTON. I do not want to discourage the committee, but that reminds me of the fact—it will only take me a moment or two to present it—that I have omitted to say what I had intended to say about the report of Mr. Taylor in the Kentucky election case. It was

very strongly argued here by Judge Saunders that that case was pre-eminently an authority of authorities, because it was so clearly an unchallenged declaration of the law on the subject as evidenced by the fact that Congress did not even pass upon it or take it up. It was never questioned in Congress. The facts, however, of that case convey to my mind an entirely different idea of its authority as representing a decision of the House of Representatives. It is a very learned and very able paper, prepared by Mr. Taylor and submitted as the argument and the voice of one lawyer in the case, backed up by the votes of a majority of his associates; but instead of being the action of the House, or approved by the House, or confirmed by the House, the fact of it is, as you will see if you read the record, that the Taylor report was never brought up in the House of Representatives, and was never acted upon by the House, and does not stand as an adjudication by the House.

I forgot to refer to the Virginia case relied upon by Mr. Saunders as sustaining the absolute and nonreviewable power of the legislature to apportion Members of Congress to districts regardless of any attempt to comply with the requirements as to compact and contiguous territory or equality of population.

In that case the legislature had passed a general apportionment act, which it was charged it had no authority to do. It was also charged that the legislature had not created districts of compact and contiguous territory and had not made a fair distribution of population. It was not even pointed out in what respect they had failed as to any one district, and the decision at best is nothing more than a general declaration of the power of the legislature to make a general apportionment of congressional districts.

As pointed out by Governor Montague, the case is not reasoned out at all, no authorities are cited, and the case itself is not even cited as an authority in any of the many succeeding cases in courts of the highest authority having under consideration the same or similar constitutional questions.

It has no analogy to the case made here, and is not a construction of the clause of the Virginia constitution invoked by us.

The CHAIRMAN. The committee are willing that you should have until Tuesday evening to file any additional authorities you wish to file, calling our attention to anything further you may wish to present.

Mr. THURSTON. We will call the attention of the committee to that election case in 138 New York.

Mr. SAUNDERS. I filed the cases of Sherrill *v.* O'Brien and of Carter *v.* Rice, myself.

The CHAIRMAN. You have until Tuesday evening at 6 o'clock for the filing of briefs.

(At 1.30 o'clock p. m. the committee adjourned.)